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[1] The District Clerk's record is divided in three parts. The first will be referred to herein as "*OV*" for Original Volume, comprised of Document Nos. 1-102, at bates 1-2908; the second as "*1S*" for First Supplemental Volume, comprised of Document Nos. 103-281, at bates 1-5025; the third as "*2S*" for Second Supplemental Volume, comprised of Document Nos. 282-346, at bates 5026-5860.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-41021

[Filed December 9, 2009]

PERFORACIONES EXPLORACIÓN Y PRODUCCIÓN, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing to Reinsurance Contract No. AHE 03004 As Amended to No. AHE-04004	)
Plaintiffs-Appellees	)
v.	)
MARÍTIMAS MEXICANAS, S.A. DE C.V., also known as MarMex	)
Defendant-Appellant	)

Appeal from the United States District Court for the Southern District of Texas, Galveston Division
USDC No. 05-CV-00419

Before BENAVIDES, DENNIS, and ELROD, Circuit Judges.

PER CURIAM:*

Appellant Marítimas Mexicanas, S.A. de C.V. ("MarMex") appeals from several rulings in favor of Appellee Perforaciones Marítimas Mexicanas ("Protexa") in an ongoing case concerning an allision between two vessels in the Gulf of Campeche, off the Mexican coast. For the reasons described below, we affirm the district court and remand to allow trial to proceed on the scope of damages awardable to Appellees.

I.

On March 31, 2004, a supply vessel, the M/V ISLA AZTECA (the "ISLA AZTECA"), allided with a mobile operating drilling unit, the MODU/TOTONACA (the "TOTONACA"), in the Bay of Campeche, approximately 45 miles off the Mexican coast. The ISLA AZTECA allegedly damaged the TOTONACA as a result of their allision. At the time of the accident, MarMex owned and operated the ISLA AZTECA, and Protexa owned the TOTONACA. Both MarMex and Protexa are Mexican entities, and both the ISLA AZTECA and the TOTONACA were Mexican flagged vessels on the date of the allision. The allision occurred beyond Mexican territorial waters but within Mexico's exclusive economic zone ("EEZ"). Under the United Nations Convention on the Law of the Sea ("UNCLOS"), Mexico does not exercise full sovereignty over its EEZ, but rather has certain "sovereign rights"

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

within the zone, including control over the economic exploitation and environmental protection of the sea's natural resources. *See* UNCLOS art. 56, Dec. 10, 1982, 1833 U.N.T.S. 397; 1 THOMAS J. SCHOENBAUM, ADMIRALTY & MAR. LAW § 2-16 (4th ed. 2004).[1]

Shortly after the allision, MarMex commenced a limitation action in Mexico under the Convention on Limitation of Liability for Maritime Claims (the "1976 Convention"), Nov.19,1976, 1456 U.N.T.S. 221, as codified in the Mexican Law of Navigation, and posted a bond of $427,460.97 to satisfy any claims arising out of the allision. Commencing a limitation action allows shipowners to avoid catastrophic liability for accidents at sea involving their vessels, capping potential damages based on some measure of the value of their ship and bringing multiple claimants into a single action. 2 SCHOENBAUM, *supra*, § 15-1. The United States is not party to the 1976 Convention, *id.*, but rather has its own Limitation of Liability Act, codified at 46 U.S.C. §§ 30501–30512 (2006). To date, Protexa has not filed a claim against MarMex in the Mexican limitation proceeding.

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[1] The United States has been a UNCLOS signatory for nearly three decades, but the Senate has not yet ratified the treaty. Nevertheless, the United States has declared that the provisions of UNCLOS establishing EEZs are declarative of customary international law. *See Mayaguezanos por la Salud y el Ambiente v. United States*, 198F.3d 297, 304 n.14 (1st Cir. 1999).

On July 28, 2005, Protexa[2] and its insurance underwriters filed suit against MarMex in federal district court in Galveston, Texas, attempting to hold MarMex liable for the alleged damage to the TOTONACA. MarMex eventually filed a motion to dismiss Protexa's suit on grounds of lack of subject matter jurisdiction, forum non conveniens, and international comity, but the district court denied the motion and allowed this case to proceed in the United States. Subsequently, the district court performed a conflicts of law analysis and ruled that Mexican substantive law, specifically Article 1913 of the Mexican Civil Code, would apply to the case, but also held that the limits to recovery established by the 1976 Convention were procedural and therefore were inapplicable in U.S. court.

For trial, the district court bifurcated the trial between liability and damages to allow the Fifth Circuit to provide guidance to the court before addressing damages. After a brief bench trial during which MarMex stipulated that the ISLA AZTECA had allided with the TOTONACA, the district court found that MarMex was liable to Protexa for the allision.

On appeal, MarMex asserts that this case should be dismissed for lack of subject matter jurisdiction, forum non conveniens, and international comity. It also argues that the district court erred when it concluded that the 1976 Convention is procedural and

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[2] Perforaciones Exploración y Producción ("PEP"), an affiliate of Protexa, initially filed suit against MarMex. However, when it became clear that Protexa was the real party in interest, and not PEP, the district court granted leave for the plaintiffs to amend their complaint, substituting Protexa for PEP.

consequently may not be used to limit MarMex's liability in this case. We address these issues in turn.

II.

Whether a district court possesses subject matter jurisdiction is a question of law, reviewed de novo on appeal. *See Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 (5th Cir. 2008). 28 U.S.C. § 1333(1) provides that "[t]he district courts shall have original jurisdiction . . . of . . . [a]ny civil case of admiralty or maritime jurisdiction . . . ." We determine that the district court does have subject matter jurisdiction under section 1333 to resolve this dispute.

MarMex contends that subject matter jurisdiction under section 1333(1) cannot reach an allision that occurred in Mexico's EEZ, relying primarily on *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971). In *Victory Carriers*, the Supreme Court stated that "the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and . . . maritime law governs only those torts occurring on the *navigable waters of the United States*." *Id.* at 205 (emphasis added). However, the weight of authority, including the precedent of the Supreme Court, supports the view that there are no clear territorial limits to federal maritime tort jurisdiction. *See, e.g., Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 285 (1897) ("[T]he law is entirely well settled . . . that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court."); *Malay. Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349, 355-56 (3d Cir. 2006) (seizure of ship at Chinese port establishes admiralty jurisdiction), *rev'd on other grounds*, 549 U.S. 422 (2007); *Coats v. Penrod Drilling*

Corp., 61 F.3d 1113, 1117-19 (5th Cir. 1995) (finding admiralty jurisdiction over tort in territorial waters of United Arab Emirates); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 311 (5th Cir. 1987) (finding that "admiralty jurisdiction over claims by Singapore plaintiffs on an alleged tort in Singapore" is "undoubted"), *rev'd on other grounds*, 486 U.S. 140 (1988). Consequently, we find MarMex's reliance on *Victory Carriers* to be unfounded. The statement in *Victory Carriers* appearing to limit jurisdiction to the navigable waters of the United States is dicta. *Victory Carriers* concerned whether jurisdiction under section 1333(1) reached an accident that occurred on a pier in Alabama, and did not address whether jurisdiction reaches the high seas or waters under the control of a foreign state. 404 U.S. at 203-04.

MarMex also argues that even if these cases are controlling, there can be no admiralty jurisdiction over maritime collisions unless the parties or their dispute have some clear link to the United States. While the strength of a case's ties to the United States are clearly relevant for a forum non conveniens or choice of law analysis, it does not impact whether a court has admiralty jurisdiction under section 1333(1). *See Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 177-78 (3d Cir. 1995); *Kim v. Frank Mohn A/S*, 909 F. Supp. 474, 476-77 (S.D. Tex. 1995). Consequently, we are confident there is subject matter jurisdiction over the allision of the TOTONACA and the ISLA AZTECA.

III.

Even if there is jurisdiction, as in this case, dismissal may still be appropriate under the doctrine of forum non conveniens. However, "[t]he forum non

conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a *clear abuse of discretion*; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Karim v. Finch Shipping Co.*, 265 F.3d 258, 268 (5th Cir. 2001) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)).

Courts considering dismissal for forum non conveniens must carry out a two-step test. First, the defendant seeking dismissal must establish that there is an alternate forum that is both available and adequate. *McLennan v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 424 (5th Cir. 2001). Since the parties do not seriously contest the availability and adequacy of the Mexican limitation action on appeal, we proceed to the next step. Second, the defendant must demonstrate that "private and public interests weigh *heavily* on the side of trial in the foreign forum." *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1164 (5th Cir. 1987) (emphasis added), *vacated*, *Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 103 (1989), *reinstated in pertinent part*, 883 F.2d 17 (5th Cir.1989).[3] "A defendant . . . bears the

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[3] The private interest factors to be weighed include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive; enforceability of judgment; and whether the plaintiff has sought to vex, harass, or oppress the

burden of invoking the doctrine and moving to dismiss in favor of a foreign forum. This burden of persuasion runs to all the elements of the forum non conveniens analysis." *Id.* (internal citations removed).

Although we might well not reach the same conclusion under de novo review, since the district court's refusal to dismiss this case resulted from "an exercise in structured discretion founded on a procedural framework," it is not a clear abuse of discretion. *Id.* at 1165. With regard to private interests, MarMex asserts that this case would be better litigated in Mexico because certain Spanish language documents remain untranslated and because it cannot access certain evidence regarding the repairs made to the TOTONACA after the allision. However, in the district court's analysis, it considered that certain evidence might be inaccessible if this case were to proceed in the United States and it also assumed that certain documents had not yet been translated. It simply found that these concerns were outweighed by other factors, such as the delay that would accompany dismissal, the relative proximity of Galveston to the

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defendant.

Karim, 265 F.3d at 269 n.14 (quotation marks and brackets omitted). The public interest factors include

> the administrative difficulties flowing from court congestion; the local interest in having localized controversies resolved at home; the interest in having the trial . . . in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Air Crash Disaster, 821 F.2d at 1162-63.

site of the accident, the completed translation of other documents, and the availability of many witnesses.

With regard to public interests, the district court concluded that Mexico has an interest in resolving this dispute in its courts, but again, found this to be outweighed by other public interest factors, as it concluded that this case would not overburden its docket and that a jury trial would not be necessary. We do note that the district court based its public interest analysis on the assumption that U.S. substantive law would apply in this case, an assumption that later proved to be unfounded. However, a district court need not conduct a conflicts of law analysis before ruling on forum non conveniens, *id.* at 1163 n.25, and as a result, we can hardly condemn this mistake. We conclude that the application of Mexican substantive law in this case does not undermine the district court's entire analysis, especially under this deferential standard of review.

The advanced stage of these proceedings also affects our review of the district court's decision to retain this case, as "[t]he fact that a trial on the merits has occurred in the plaintiff's selected forum does have some effect on our decision of whether the district court abused its discretion in maintaining the action before it." *Id.* at 1167. Although the trial in this case has not yet reached the damages stage, MarMex has already been found liable to Protexa. Moreover, this litigation has now proceeded in our courts for more than four years, and its resolution is finally in sight. MarMex has not demonstrated that it would be "greatly prejudiced" if trial were to go forward in this country on damages. *Id.* at 1168. Although some evidence concerning the cost of the repairs to the

TOTONACA may be unavailable in this country, MarMex has not proven that this evidence would be any more available if this case were to proceed in Mexico. Additionally, since the district court denied MarMex's motion to dismiss in 2006, new evidence has come to light suggesting that Galveston may be a more convenient forum than it initially appeared: MarMex conducts some business in the United States, and the ISLA AZTECA has called on U.S. ports from time to time. Given these considerations, since the district court weighed all relevant factors, and we do not find its analysis unreasonable, we find that the district court did not abuse its discretion by denying a forum non conveniens dismissal.

IV.

MarMex also contends that the district court erred when it did not dismiss Protexa's suit out of respect for international comity. A district court's decision to exercise or decline jurisdiction in the face of possible international comity concerns is reviewed for abuse of discretion. *Seguros Del Estado, S.A. v. Scientific Games, Inc.*, 262 F.3d 1164, 1169 (11th Cir. 2001); *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998). We conclude the district court did not abuse its discretion.

Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Dismissal of a suit on international comity grounds may sometimes be appropriate when there is litigation pending in a

foreign forum or, even absent such litigation, when allowing a case to proceed in the United States would intrude on the interests of a foreign government. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004).

MarMex relies on *Sequihua v. Texaco, Inc.* to suggest that this case should be dismissed out of deference to Mexican interests. 847 F. Supp. 61 (S.D. Tex. 1994). However, this case is readily distinguishable from *Sequihua*, where a district court dismissed a suit alleging pollution affecting a third of Ecuadorian territory after Ecuador had "expressed its strenuous objection to the exercise of jurisdiction." *Id.* at 63. Mexico has remained silent in this case, and while the TOTONACA was engaged in oil exploration at the time of the allision, it is unclear how the resolution of this private dispute by a U.S. court would impede Mexico's ability to exercise its sovereign rights over economic exploitation within its EEZ. *See* UNCLOS art. 56, *supra*.[4]

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[4] We note that *Sequihua* is inapposite in this case for another reason. In *Sequihua*, the district court relied on section 403 of the Restatement (Third) of the Foreign Relations Law of the United States to guide its analysis. 847 F. Supp. at 63. However, section 403 is not relevant to MarMex and Protexa's private law dispute, as section 403 concerns prescriptive jurisdiction, the authority of the United States to make its *public* law applicable extraterritorially. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, ch. 1, subch. A introductory note ("[Section 403] concentrates on so-called public law—tax, antitrust, securities regulation, labor law, and similar legislation. . . . [T]he rules stated in [Section 403] do not necessarily apply to controversies unrelated to public law issues.").

Additionally, MarMex has failed to cite any case where a U.S. court has deferred to a foreign limitation proceeding on international comity grounds. Limitation proceedings commenced under U.S. law only receive domestic recognition, *Otal Invs. Ltd. v. M.V. Clary*, 494 F.3d 40, 63 (2d Cir. 2007); *Matter of Bouboon Sangsa Co.*, 720 F.2d 595, 599 (9th Cir. 1983) ("Because a decree in limitation normally receives only domestic recognition, 'the courts of each country will apply local law on the question of limitation; no country will give effect to a foreign limitation decree as barring further suit.'" (internal brackets removed) (quoting GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY 945 (2d ed. 1975))), and although the 1976 Convention requires its signatories to defer to certain limitation proceedings abroad, the United States has not adopted the Convention. 2 SCHOENBAUM, *supra*, § 15-1 n.7. Given these considerations, the district court's decision not to defer to the Mexican limitation proceeding on comity grounds does not rise to being an abuse of discretion.[5]

V

Finally, MarMex asserts that the district court erred in determining that the limits on liability established by the 1976 Convention and codified in Mexican law are procedural and thus cannot be applied in United States court. "This Court reviews questions of law, including conflicts of law questions,

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[5] We do not mean to suggest that a district court could not properly exercise its discretion to dismiss a case under forum non conveniens when a party has commenced a foreign limitation action.

de novo." *Cantu v. Jackson Nat'l Life Ins. Co.*, 579 F.3d 434, 437 (5th Cir. 2009) (quoting *Abraham v. State Farm Mut. Auto. Ins. Co.*, 465 F.3d 609, 611 (5th Cir.2006)). Similarly, determinations of foreign law are reviewed de novo on appeal, and courts may consider information from any relevant source, including information not considered by the district court. *See* Fed. R. Civ. P. 44.1; *Grupo Protexa, S.A. v. All Am. Marine Slip*, 20 F.3d 1224, 1239 (5th Cir. 1994).

The leading case on conflicts of law in this area is *Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd. (The Norwalk Victory)*, 336 U.S. 386 (1949). In *The Norwalk Victory*, the Supreme Court held that U.S. courts may apply a foreign limit on liability, but only when the limit is substantive and "attaches" to the right of recovery created by foreign law, as opposed to merely "provid[ing] procedural machinery by which claims otherwise created are . . . scaled down to their proportionate share of a limited fund." *Id.* at 396. MarMex argues that we should perform a "policy-based conflicts analysis" to determine which liability limit applies in this case, relying on a reading of *The Norwalk Victory* advanced in *Complaint of K.S. Line Corp.*, 596 F. Supp. 1268, 1270-72, 1274 (D. Alaska 1984). However, we have never adopted such an approach, finding instead that "United States courts 'must apply foreign limitation law if the substantive liability of the parties is governed by a foreign law *and* if the limitation law of the foreign country is such an integral part of the substantive law governing the action that it can be said to 'attach' to the substantive liability law.'" *Karim*, 265 F.3d at 270 (quoting *In re Korea Shipping Corp.*, 919 F.2d 601, 604-05 (9th Cir. 1990)). In other words, the term "substantive" is a term of art, referring to how integral

a cap on liability is to a cause of action. *Korea Shipping Corp.*, 919 F.2d at 605.

We conclude that the cap on liability created by the 1976 Convention does not attach to the right of recovery created by Article 1913 of the Mexican Civil Code. The 1976 Convention does not create a right of recovery, but only limits the recovery available under Article 1913 and other sources of liability. *See* 1976 Convention art. 2, *supra*, 1456 U.N.T.S. at 223 ("[T]he following claims, *whatever the basis of liability may be*, shall be subject to limitation of liability . . . ." (emphasis added)). We find the reasoning in *Matter of Bethlehem Steel Corp.* persuasive, where a district court held that a cap on liability established by the Canada Shipping Act should not be applied in U.S. court, as the cap did not "limit the individual claimant's right to recover certain categories of damages," but instead served "only to measure or quantify damages." 435 F. Supp. 944, 948 (N.D. Ohio 1976); *aff'd*, 631 F.2d 441 (6th Cir. 1980). Additionally, the cap on liability established by the 1976 Convention is not "substantive" because it is not so integral as to follow liability under Article 1913 in all maritime cases, as an absolute cap on recovery would. The 1976 Convention provides only that "[l]imitation of liability *may* be invoked" by a shipowner, not that it must be applied by a court as an absolute limit to liability. 1976 Convention art. 10, *supra*, 1456 U.N.T.S. at 227 (emphasis added). As a result, the limits established by the 1976 Convention are not substantive—liability under Article 1913 in a maritime case could exceed the cap established by the 1976 Convention. *Cf. The Norwalk Victory*, 336 U.S. at 395 (suggesting that "if it is the law of Belgium that the wrong creates no greater liability than that recognized by the

Convention of 1924," then the Convention's limit on liability would be substantive). The district court did not err in finding the Mexican limit on liability inapplicable in this case.

VI.

For the foregoing reasons, the district court is AFFIRMED and this case is REMANDED to allow trial to proceed on damages.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-41021

[Filed December 9, 2009]

PERFORACIONES EXPLORACIÓN Y PRODUCCIÓN, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing to Reinsurance Contract No. AHE-03004 As Amended to No. AHE-04004	)
Plaintiffs-Appellees	)
v.	)
MARÍTIMAS MEXICANAS, S.A. DE C.V., also known as MarMex	)
Defendant-Appellant	)

Appeal from the United States District Court for the Southern District of Texas, Galveston
D.C. Docket No. 3:05-CV-419

Before BENAVIDES, DENNIS, and ELROD, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:05-cv-419
(ADMIRALTY)

[Filed September 2, 2008]

PERFORACIONES MARITIMAS MEXICANAS S.A. de C.V. and CERTAIN REINSURING UNDERWRITERS SUBSCRIBING TO REINSURANCE CONTRACT NO. AHE-030044 AS AMENDED TO NO. AHE-04004,	)
Plaintiffs,	)
v.	)
SEACOR HOLDINGS, INC., GRUPO TMM S.A. de C.V., and MARITIMA MEXICANA S.A. de C.V.,	)
Defendants.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Status of the Case

This lawsuit was filed on July 28, 2005 in the Southern District of Texas, Galveston Division against Seacor Holding, Inc., Grupo TMM S.A. de C.V. and Maritima Mexicana, S.A. de C.V. ("MarMex"). Seacor was dismissed from the lawsuit. Plaintiffs' counsel initially named Perforaciones Exploration y Produccion as Plaintiff, but were subsequently allowed to amend their Complaint to name Perforaciones Maritimas Mexicanas, S.A. de C.V. ("PMM) as Plaintiff.

The case involves an allision between Defendants' Mexican flagged supply vessel, the ISLA AZTECA, and Plaintiffs' Mobile Offshore Drilling Unit TOTONACA, another Mexican flagged vessel. It is undisputed that the allision occurred on March 31, 2004 in Mexico's Bay of Campeche. It is undisputed that both Plaintiff Perforaciones Maritimas Mexicanas and Defendant Maritima Mexicana (MarMex) were incorporated in Mexico.

In July 2006, the Predecessor Court denied Defendants' motion to dismiss on *forum non conveniens*, principles of international comity, and for lack of subject matter jurisdiction. In November 2006, the Fifth Circuit dismissed Defendants' interlocutory appeal of that Order, finding that the Order did not determine the parties' substantive rights and liabilities. *See Perforaciones Exploracidn y Production et al. v. Grupo WS A et al.*, No. 6-41228 (5th Cir. Nov. 30, 2006). In May 2007, the Predecessor Court determined that Mexican substantive law would be applied to this case and that Article 1913 of the

Mexican Civil Code was applicable as Mexican substantive law.

The case was reassigned to this Court in October 2007. The Court denied Defendants' motions to reconsider the Predecessor Court's orders denying dismissal of the case and finding that Article 1913 of the Mexican Civil Code would apply to the case. In April 2008, the Court granted Defendants' request to bifurcate the case, and parties agreed that the sole issued to be tried by this Court under Article 1913 were: 1) Whether Grupo TMM was a "user" of the ISLA AZTECA; and 2) Whether there was a causal relationship between the allision and the damage to the TOTONACA's spud cans.[1]

This case was tried to the Court on May 5-6, 2008. Pursuant to Federal Rule of Civil Procedure 52, the Court's findings of fact and conclusions of law are set forth below.

II. EVIDENTIARY RULINGS

At the Bench Trial, the Court took under advisement the question of whether to exclude the testimony of Defendants' expert, Gregg Perkin, and whether to admit Plaintiffs' Exhibit 426.

A. Gregg Perkin

Mr. Perkin is a mechanical engineer and owner of a metallurgical laboratory, though he is not himself a

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[1] *See infra*, Part III (C), (E), for a detailed description of the spud cans.

metallurgist. According to Plaintiffs, Mr. Perkin was initially designated to provide an opinion as to loss of hire. Defendants point out that Mr. Perkin provided a report to Plaintiffs early in the litigation discussing the spud can cracks and his inability to determine their causes, and that Plaintiffs had the opportunity to depose Mr. Perkin about his report. Mr. Perkin testified to the fact that he cannot say what caused the cracks to the spud can to leg connections,[2] that there is testing that could have been done that would have revealed the cause of the cracks, and that the testing was not performed.[3] In response to questioning by Plaintiffs, Mr. Perkin also testified that he has not seen the prior welds to the TOTONACA spud cans and that his report may have been based on drawings of spud can cracks identified in 2000, and not 2004. Mr. Perkin also admitted he did not have experience with regard to leg repairs.

The Court finds that Mr. Perkin's testimony should be admitted. Plaintiffs' Motion, Doc. No. 273, is therefore **DENIED**.

B. Plaintiffs' Exhibit 426

Plaintiffs offered into evidence Exhibit 426, a report by Beacon Maritime regarding inspections of the spud can to leg connections of the TOTONACA and the

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[2] *See infra*, Part III (C), (E), for a detailed description of the TOTONACA spud cans and the spud can to leg connection cracks.

[3] As the Court explains in its Findings of Fact, Plaintiffs' expert Jacob Alford appears to agree with Mr. Perkin that destructive testing could have explained the cause of the cracks and that the testing was not done.

cracks identified in those connections in 2004.[4] The Beacon Report also includes a report from ASH related to these inspections.

Defendants argue that the Beacon Report is inadmissible hearsay and that the ASH report is hearsay within hearsay. Plaintiffs did not provide testimony of a custodian or other qualified witness, or certification of the reports as required by Federal Rule of Evidence 803(6), which establishes a hearsay exception for records of regularly conducted activity.

Plaintiffs urge the Court to admit Exhibit 426 under Federal Rule of Evidence 807. Rule 807 provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 807.

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[4] *See infra*, Part III (C), (E), for a detailed description of the TOTONACA spud cans and the spud can to leg connection cracks.

Defendants further object to the admission of Exhibit 426 because Plaintiffs failed to disclose witnesses related to the ASII inspection, specifically David Carpenter, whose name appears repeatedly as "Inspector" in the ASII report. Plaintiffs maintain that these documents were exchanged in discovery, and that it was unreasonable for counsel for Plaintiffs to itemize every single repairman who worked on the rig.

The Court finds that the Beacon Report and the AS11 inspection report, Exhibit 426, is inadmissible hearsay outside any Rule 803 exception and should not be admitted under Rule 807.

Plaintiffs' expert, Mr. Jacob Alford, testified that he relied on Exhibit 426 in formulating his opinions. Defendants also appear to object to Mr. Alford's reliance on the document or testimony interpreting the document, because Mr. Alford admitted that he is not an expert on spud can design and repairs.

The Court will allow Mr. Alford's testimony regarding the location of the cracks in the spud can to leg connections of the TOTONACA. Mr. Alford's reliance on Exhibit 426 is permissible pursuant to Federal Rule of Evidence 703.

C. Other Evidentiary Motions

Plaintiffs' Motion to Exclude Testimony of Defendants' Expert D.J. Green, Doc. No. 273, and Defendant's Motion to Exclude Testimony of Plaintiffs' Expert Mario Carlin, Doc. No. 251, are **DENIED AS MOOT**. Neither of these experts testified at trial, either in person or by deposition.

III. FINDINGS OF FACT

A. Stipulations of Fact

1. Defendants have stipulated that on March 31, 2004, the ISLA AZTECA allided with the TOTONACA, causing damage to the TOTONACA's leg and raw water tower and resulting in loss of use of the TOTNACA during the period of repairs.

B. Ownership of the TOTONACA

2. Defendants have represented to the Predecessor Court, this Court, and the Fifth Circuit on numerous occasions in motions, briefing, and at hearings, that Plaintiff PMM is the owner of the TOTONACA. Defendants did not challenge PMM's ownership of the TOTONACA until May 6, 2008, the second day of the Bench Trial.

3. Plaintiffs alleged that PMM was the owner of the TOTONACA in their Amended Complaint filed May 31, 2006. (*See* First Am. Compl., Doc. No. 61, ¶ 11.) Defendants did not file an amended answer, and did not specifically deny the allegation that PMM owned the TOTONACA in any responsive pleading.

4. Defendants urged the Predecessor Court in June 2006 to deny Plaintiffs' Motion to File Amended Complaint, arguing that "[t]here is no question that PMM has been the true

owner of the TOTONACA . . . ." (Doc. No. 50.)

5. Defendants asserted that the TOTONACA was "owned and operated by Perforaciones Maritimas Mexicanas" again in a Motion to Apply Mexican Law, a Motion for Summary Judgment, an Emergency Motion to Stay Pending Appeal, and a Request for Written Certification. (Doc. No. 63, 74, 76, 77; see *also* Doc. No. 198 (counsel's statement at a July 14, 2006 hearing).) Defendants again declared that it was "undisputed" that PMM was the "true owner of the Totonaca" in a Motion for Expedited Hearing and again in a Motion for Reconsideration (Doc. No. 85, 216.) In briefing, Defendants represented to the Fifth Circuit that PMM owned the TOTONACA "at all relevant times."

6. Defendants have repeatedly asked this Court, the Predecessor Court, and the Fifth Circuit to rely on the fact that PMM filed a criminal action in Mexico when considering (initially, on reconsideration, and on interlocutory appeal) whether to dismiss the case for lack of subject matter jurisdiction, on principles of international comity, or on grounds of *forum non conveniens*. Defendants also asked these courts to consider the fact that PMM was named in an Ex Parte Declaratory Judgment Proceeding to limit liability in Mexico and was allegedly able to seek civil damages in the limitations action in reaching a decision on those Motions. (*See, e.g.*, Doc. No. 53, Affidavit of

Dr. Melo; Doc. No. 74, Affidavit of Dr. Melo; Defendants' Brief to Fifth Circuit; Doc. No. 113 at 9; Doc. No. 216.)

7. Counsel for Defendants MarMex and Grupo TMM, on behalf of former Defendant Seacor, also argued in a Motion to Dismiss before the Predecessor Court that PMM was the actual owner of the TOTONACA, and the Predecessor Court accepted that fact in its Order on Defendant Seacor's Motion to Dismiss. (Doc. No. 50 at 4 ("PMM was the actual owner of the TOTONACA").) The Predecessor Court also relied on Defendants' representations that PMM was the actual owner of the TOTONACA when granting Plaintiffs' request to amend its Complaint to add PMM as a Plaintiff.

8. The Fifth Circuit stated in its Order denying interlocutory appeal that "'The TOTONACA was owned by Perforaciones Maritimas Mexicanas, S.A. de C.V. ('PMM')." (Doc. No. 115.)

9. This Court accepted the fact that PMM was the owner of the TOTONACA in its Order denying Defendants' Motion for Reconsideration. (Doc. No. 230 ("It remains undisputed that Perforaciones Mexicanas Maritimas, the owner of the TOTONACA . . . [was] incorporated in Mexico.").)

10. Defendants did not argue that PMM was not the owner of the TOTONACA or that PMM did not have a proprietary interest in the

TOTONACA until the second day of a bench trial, after this Court had bifurcated the trial and Plaintiffs had withdrawn a number of exhibits including invoices reflecting that PMM had paid the costs of repairs.

11. Based on Defendant's repeated representations that PMM is the owner of the TOTONACA and Defendant's failure to deny PMM's ownership of the rig as alleged in the Amended Complaint, the Court finds that Defendants are judicially estopped from now claiming that PMM was not the owner of the TOTONACA.

C. Description of the TOTONACA

12. The TOTONACA is a self-elevating Mobile Offshore Drilling Unit. It measures approximately 53 meters in length and width. It is triangular in form, with three legs, independently operated, located on the forward, port, and starboard corners of the hull that are of lattice tubular high resistance steel construction. The tubing and and/or bracings of each leg is also made of high resistance steel. The legs of the TOTONACA are transparent and designed to minimize wind and wave forces. The bracings on the leg of the TOTONACA tie the leg together, and are part of the overall structure that allows the rig to stand up.

13. The TOTONACA has a raw water tower, located below the deck to the port side and a bit aft of the bowleg. The raw water tower is

made of steel, and is a structure that is not designed to flex. The raw water tower does not provide structural support to the rig.

14. The bottom of each of the TOTONACA's three legs is fitted with a spud can. The spud cans are welded to the leg. The spud cans act as a ballast to keep the platform steady. The spud cans are a tank, with a manhole to access the interior of the tank, measuring approximately nine meters in diameter.

15. In order to move the TOTONACA to and from different locations, either a heavy lift submersible or towing vessel must be utilized. With the self-elevating system, the TOTONACA is able, once floated into position, to lower the legs to the sea floor. The spud cans on the bottom of the leg penetrate the seafloor. The legs penetrate until the ground reaction causes the penetration to stop. As the legs penetrate the soil, the soil moves, flows in a semicircle around the spud can, fluffs up to the side and on top of the spud can, becoming 'disturbed' soil. The soil becomes disturbed because it has lost its strength as a result of the insertion of the spud can. When the legs have reached their maximum penetration, the jacking systems continue to move in the same direction, but now lifting the hull out of the water.

16. At the time of the allision, the height of the bottom of the upper hull above the surface of the water was 50 feet.

17. When the rig is ready to move locations, the barge engineer or captain calculates the expected draft of the rig and the expected center of gravity, so that it will float level. The rig is then jacked down to the calculated level, and jetting hoses are hooked up. The jetting hoses pump sea water down to the nozzles on the lower and upper surface of the spud can. The purpose of the lower surface nozzles is to break the suction of the soil with the can. The nozzles on the upper can wash off or "fluff up" any soil that is on top of the can. At that point, the legs are raised. If the legs do not pop free at that point, the barge engineer pulls the rig one foot below the equilibrium draft which results in one foot of buoyancy pulling up on the legs. The legs are then pulled up with a gentle lift.

D. March 31, 2004 Allision

18. On March 31, 2004, the TOTONACA was positioned in the Bay of Campeche, located in what is known as the Exclusive Economic Zone of Mexico. The TOTONACA was jacked up and was engaged in drilling operations at well Sinan 156 pursuant to a contract between PMM and Pemex. The TOTONACA had been at that site since May 2003.

19. On March 31, 2004, Mr. Juan Manuel Orta Flores was the Chief Mate onboard the ISLA AZTECA. After leaving the PRIDE OF TEXAS, Mr. Flores put the ISLA AZTECA on autopilot, increased the speed, and continued at the increased speed until the

ISLA AZTECA was less than a mile away from the TOTONACA.

20. Mr. Flores does not know the exact speed the ISLA AZTECA reached after he increased the speed. Mr. Flores then decreased speed to approximately 3 knots. When the ISLA AZTECA was approximately 0.3 miles away from the TOTONACA, Mr. Flores attempted to switch from autopilot to manual control, but was unsuccessful.

21. As a result of Mr. Flores' failure to control the course and speed of the ISLA AZTECA, the bow of the ISLA AZTECA forcefully allided with the bow leg and the raw water tower of the TOTONACA. The ISLA AZTECA first struck the TOTONACAYs raw water tower, and then made direct impact with the bracings of Leg Number One. Although the exact speed of the ISLA AZTECA at the time of the allision is unknown, testimony from Mr. Flores and from Plaintiffs expert Kevin Highfield[5] indicates that ISLA AZTECA, a 1600 ton vessel, was likely traveling at approximately 3 knots when it hit the TOTONACA. The ISLA AZTECA did not follow typical procedures when approaching the

[5] Kevin Highfield is a master mariner who has been involved in many damage surveys and has investigated many allisions. He personally observed damage to the TOTONACA and estimated the speed at which the ISLA AZTECA was traveling when it allided with the TOTONACA. He was designated by Plaintiffs as an expert in navigation and vessel management issues.

TOTONACA; for example, it did not stop at a distance, reduce its speed, change its position, or approach the rig stern side.

22. It is undisputed that the TOTONACA could not navigate the rig to avoid the allision because it was fixed to the sea bed.

23. At the time of the allision, the TOTONACA was properly lit. On March 31, 2004, the TOTONACA met all the classification and governmental requirements.

24. The impact of the allision was strong enough to seriously damage both the ISLA AZTECA and the TOTONACA.

E. Cracks in the Spud Cans

25. In 2000, prior to the allision, cracks were discovered in the TOTONACA spud can to leg connections. These cracks were repaired, and a company certified by the Lloyd's Register performed non-destructive tests on the welds to verify the welds.

26. There is no evidence in the record explaining what caused the cracks in the spud can to leg connections of the TOTONACA in 2000. There has been no allegation that the TOTONACA was involved in an allision or other accident that led to the cracks that were discovered in 2000.

27. In 2004, after the allision, cracks were again discovered in the spud to leg can connections of the TOTONACA.

28. Plaintiffs expert, Jacob Alford, is a Project Manager employed by Bennett & Associates. He is a specialist in the operation and repair of jack-up drilling units.

29. Mr. Alford was hired to act as a consultant in devising a scheme for the recovery, lowering and repair of the TOTONACA forward leg. He was not specifically hired to consult on repairs to the spud cans or methods to repair the spud cans of the TOTONACA.

30. Mr. Alford has looked at spud can to leg cracks about five times over the past 30 years, but has not repaired them himself. Mr. Alford has never been called upon to determine the cause of cracks in spud cans.

31. Mr. Alford did not directly inspect the spud can to leg connections of the TOTONACA. Mr. Alford did review a Safetech Marine Services report on the cracks discovered in the spud cans in 2000 and an inspection report prepared by Beacon Maritime identifying the cracks to the spud can to leg connections discovered in 2004.

32. After reviewing information about the damage on the topside of the TOTONACA, Mr. Alford was concerned about damage to the spud can to leg connections of the rig.

33. As Mr. Alford testified, some of the cracks discovered in 2004 were at the same location as the 2000 cracks, but the lengths of the cracks discovered in 2004 were different from the length of the cracks discovered in 2000. Some of the cracks discovered after the allision were not in the same location as the cracks that appeared in 2000. For example, on Leg 1, there were no cracks in the "C cord" in 2000, but cracks were discovered in the "C cord" in 2004. Also, there were no cracks discovered in Leg 3 in 2000, but two cracks were discovered in Leg 3 in 2004.

34. There are several possible reasons that cracks might appear in a vessel's spud can to leg connection.

35. Both Plaintiffs' and Defendants' witnesses agree that a considerable force imparted to a three-legged jack-up rig at the leg and raw water tower could cause cracks to spud can to leg connections.

36. Mr. Alford testified, for example, that when a considerable force is applied at the top of the leg, a bottom force would also have been applied to the leg to can connection. The Court did not allow Mr. Alford to testify as to whether the force of the March 31, 2004 allision actually caused the alleged cracks in the TOTONACA spud can to leg connections, because Mr. Alford admitted that he could only speculate as to the possible causes of cracks.

37. Although Defendants' expert Carey Akin agreed that an allision could cause a fracture in a spud can of a three-legged jack-up rig if enough strength is taken away from one leg, he could not say if the March 31, 2004 allision actually caused the cracks in the TOTONACA spud can to leg connections.

38. Spud can cracking can be caused by fatigue caused by environmental forces. Studies show that rigs in the North Sea may be prone to this kind of fatigue cracking, but rigs located in the Bay of Campeche are not subject to as severe an environment as those in the North Sea.

39. If cracks to a spud can are repaired improperly, the prior welds could fail. The cracks discovered in 2000 were certified as fully repaired. Although improper welding procedures could not have caused all of the cracks discovered in 2004, it is at least possible that some of the cracks discovered after 2004 could have been caused by failed welds.

40. Mr. Luis Elorza Cinta, the project manager in charge of repairs to the TOTONACA designated by Plaintiffs as having expert knowledge in repairs and costs, testified that spud can cracks can occur from pulling the spud cans out of the sea bed. Mr. Elorza Cinta did testify, however, that he did not have expert knowledge of that fact. Mr. Alford testified that although the jetting process may loosen the soil that is sitting on

top of the spud cans, it does not always remove all of the soil. If the jetting process is not enough to lift the spud cans, buoyancy is required to pop the legs out of the sea floor.

41. Months after the allision, the spud cans were pulled out of the sea bed and taken to port to for inspection. According to Mr. Elorza Cinta, legs were probably reinserted in the mud at port and later pulled back out again.

42. Defendant's expert, Gregg Perkin, is a registered professional engineer in Texas and twelve other states, and holds a degree in mechanical engineering. Mr. Perkin owns Engineering Partners International and EPI Materials Testing Group, which are, respectively, a laboratory and a mechanical testing and metallurgical laboratory.

43. Mr. Perkin has not personally inspected cracks in spud can connections nor has he been involved in the design or repair of spud cans. Mr. Perkin could not say what caused the cracks in the spud can to leg connectors of the TOTONACA that were discovered in 2004.

44. Mr. Alford and Mr. Perkin agreed that destructive testing could have determined the cause of the cracks to the spud can to leg connections or at least could have helped determine the cause of the cracks. Such testing requires a six inch piece of steel to be cut out of the leg to can connection.

Destructive testing was not conducted to determine the cause of the TOTONACA spud can to leg connection cracks.

IV. CONCLUSIONS OF LAW

A. Judicial Estoppel

1. "Judicial estoppel is 'a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position'." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999)(citing *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)). "The purpose of the doctrine is 'to protect the integrity of the judicial process,' by 'prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.'" *Id.* The Supreme Court has observed that courts also consider "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped" when deciding whether to apply the doctrine of judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). The doctrine is generally only applied where the position is clearly inconsistent with a party's previous position and where the party convinced the court to accept the previous position. *In re Costal Plains*, 179 F.3d at 206. Judicial acceptance "means only that the . . . court has adopted the position urged by the party, either as a preliminary matter or as part of a final

disposition." *Id.* (citing; *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988)). The Fifth Circuit "has indicated that the doctrine applies to more than just sworn statements of a party and likewise has never specifically stated that it applies only to a party's sworn statements." *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (applying judicial estoppel to statements made by a party's attorney to the court in pleadings, motions, responses to motions, and at the pretrial hearing). The doctrine of judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *New Hampshire*, 532 U. S. at 751.

2. The Court finds that Defendants are judicially estopped from asserting that PMh4 is not the owner or has no adequate proprietary interest in the TOTONACA based on their multiple prior representations that PMM is, in fact, the owner of the rig.[6] This position is entirely inconsistent with Defendants' prior position, i.e. that PMM

[6] Defendants have not addressed Plaintiffs' argument that the holding of *Robbins Dry Dock* is entirely inapposite, because its holding is substantive law, and this Court is applying Mexican substantive law (at the urging of Defendants). *See, e.g., Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307-10 (1927); *State of La. ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1022-23 (5th Cir. 1985). Neither party has attempted to brief the Court on what interest a Plaintiff must have under Mexican law in order to maintain a lawsuit such as this one.

was the true owner of the TOTONACA.[7] The Predecessor Court and this Court adopted that argument in prior Orders and relied on this repeated representation when issuing rulings on Defendants' Motion to Dismiss and Motion for Reconsideration. Furthermore, Defendants' extremely tardy change of position would impose a serious detriment to Plaintiffs, and to this and the Predecessor Court.

B. Jurisdiction and Relevant Mexican Law

3. The Court has jurisdiction over the parties and this matter pursuant to its admiralty and general maritime jurisdiction under 28 U.S.C. § 1333 and Federal Rule of Civil Procedure

4. Article 1913 of the Mexican Civil Code governs this case. Article 1913 provides: "If a person employs mechanisms, instruments, equipment or substances which are inherently dangerous, because of the speed

[7] It is not entirely clear whether the representation that PMM filed a criminal complaint in Mexico and was named in the limitation action is clearly inconsistent with the party's current allegation that PMM is not the owner of the TOTONACA. This Court is not fully briefed as to whether PMM would have to have a proprietary interest in the TOTONACA of the sort defined by *Robbins Dry Dock* and its progeny to seek damages in the limitation action. Defendants' multiple representations that PMM has at all relevant times been the true owner of the TOTONACA, however, is clearly inconsistent with Defendants' current position that Plaintiffs have not proven that PMM has a proprietary interest in the ru

they develop, their explosive nature or inflammable characteristics, or by the intensity of the electric current, or similar causes, he/she is liable for the damages or injuries they caused even though he/she is using them illicitly, unless he can prove that the damage was caused by the fault or inexcusable negligence of the victim."

5 The elements of a cause of action under Article 1913 are, therefore: 1) "Use" by the defendant of a substance or thing; 2) "Dangerousness" of the substance or thing; 3) "Damages"; and 4) "Causal relationship" between the defendant and the damage. See Woodfin L. Butte, *Strict Liability in Mexico*, 18 AM. J. COMP. L. 805, 816 (1970).

6 Defendants have stipulated that the ISLA AZTECA was a "dangerous instrument" and that MarMex was a "user" of that dangerous instrument.

7 Defendants have stipulated that the March 31, 2004 allision caused damages to the TOTONACA, but deny that the allision caused the cracks in the spud can to leg connections.

1. Liability of Defendant MarMex.

8 The Court finds that Plaintiffs have proven that the Defendant MarMex is liable under Article 1913, i.e., MarMex was a user of a dangerous instrument (the ISLA AZTECA) and caused damage to the TOTONACA. As

the Court will discuss further, infra, MarMex is not liable, however, for damage to the TOTONACA spud cans.

2. Liability of Defendant Grupo TMM and Definition of "User" Under Article 1913

9. The Court finds that Defendant Grupo TMM is not liable for damages caused by the allision under Article 1913. Grupo TMM cannot be considered a "user" of the ISLA AZTECA under Mexican law, nor is there evidence to support piercing of the corporate veil under United States law.

10. Plaintiffs allege that Defendant Grupo TMM owns 60 percent of MarMex and exercised substantial corporate control over MarMex by providing managers for MarMex and services for MarMex's strategic planning and day-to-day operations including legal, treasury, tax, accounting, operations, human resources, budget, and insurance services.[8]

11. Mexico is governed by a civil law system. The Fifth Circuit has discussed the application of law in a civil law system, explaining "The primary source of law is

[8] Although Defendants previously represented to the Predecessor Court and this Court that Grupo TMM owned 60 percent of MarMex in response to interrogatories, affidavits, and in motions, they now claim that Transportes Maritimas Mexicanas, a wholly owned subsidiary of Grupo TMM, was the 60 percent shareholder of MarMex in 2004

legislation, not judicial decision–as is true in common law systems. In practical terms, civilian jurists must turn first to enacted statutes as superior sources of law. Only when no legislation controls an issue are lawyers and judges entitled to look elsewhere for solutions to legal problems. Judicial decisions as a class are merely persuasive authority to be used only when neither legislation nor custom provide a rule of decision. Stare decisis as it is known in common law is rejected by the civil law tradition. Judicial decisions are law only to the extent they either fill in the gaps left by legislation and custom or establish custom." *Henry v. SIS Bermuda Star*, 863 F.2d 1225, 1230-31 (5th Cir. 1989); *see also Curley v. AMR Corp.*, 153 F.3d 5, 14 (2d Cir. 1998) ("Mexican law is much different, and its sources do not lie in precedent cases. As a civil law jurisdiction, Mexican courts consider the text of the constitution, civil code and statutory provisions as the primary source of law and give them preponderant consideration."). Some case law in Mexico does have precedential value, however. *See, e.g.*, Carlos R. Soltero & Amy Clark-Meachum, *The Common Law of Mexican Law in Texas Courts*, 26 HOUSTON J. INT'L L. 119, 137 (2003) ("In Mexico, case law has precedential value only if it is *jurisprudencia obligatoria* or *jurisprudencia definida*, which means that the Mexican Supreme Court has considered and decided the same issue five consecutive times in the same way."); Testimony of Dr. Melo, Doc. No.

289, Ex. 5 ("In order for case law to become binding authority in Mexico . . . there must be five cases on point with a better than 3-2 vote in support of the opinion rendered in the case."); STEPHEN ZAMORA ET AL., MEXICAN LAW 85 (Oxford 2005) (explaining the difference between *jurisprudencia obligatoria* and 'isolated' rulings or *tesis aisladas*). Furthermore, "Mexican judges often follow prior rulings of other courts and judges voluntarily, not because Mexican law or legal doctrine mandates that they do so but because doing so serves other purposes." ZAMORA, *supra*, at 83.

12. Article 1913 does not clarify exactly which defendants can be considered to have "used" a dangerous instrumentality. The Fifth Circuit has acknowledged that "'Under Mexico's strict liability, the defendant is normally the user (whether owner, agent or bailee) of an inherently dangerous mechanism, instrument, apparatus or substance who, with his use, injures the plaintiff" (citing *Symposium, Part Five: A Serious Accident Occurs in the Mexican Plant: Problems of Corporate and Product Liability*, 4 U.S.-MEX. L.J. 125, 128 (1996)).

13. The Court is aware of no other Mexican statutory provision or case that specifically addresses the question of whether a company that is a majority shareholder of another company can be held liable for damage caused by the subsidiary under Article 1913.

14. Plaintiffs' Mexican law expert, Dr. Jose David Enriquez Rosas, testified that Article 1913 reaches a "commercial user" of a dangerous instrument. According to Dr. Enriquez, the purpose of Article 1913 "was to protect consumers from abuses by the corporations whilst the development of the Mexican industry was taking place. Thus, the way to prevent circumventions to the spirit of article 1913 was-and is now to have a wide interpretation of the term 'user,' not only in connection with the operation itself, but also to the economic gain of said operation." (Doc. No. 241, Ex. 1, at 4.)

15. Dr. Enriquez further contends that where a company exercises economic or corporate control over another company, it may be considered a "commercial user" for purposes of Article 1913. (*Id.*) Dr. Enriquez has not specifically defined "corporate control." According to Dr. Enriquez, "economic control occurs, *inter alia*, when a company obtains all or most profits from another company." (*Id.*) Dr. Enriquez concludes that "[a] different view would simply create an incentive for economic groups to sophisticate their corporate organizations in order to evade their responsibility." (*Id.*) Dr. Enriquez testified that a company that receives over 50 percent of the profits of another entity could be considered to exercise such economic control over another company, but did not cite to any code provision or case law in support of this theory.

16. Dr. Enriquez insists that the liability of a "commercial user" under Article 1913 has "nothing to do with the application of any doctrine regarding the piercing of the corporate veil. In the 'commercial user' test, one does not need to analyze the subsidiary-holding corporate structure in detail, but simply to establish the economic benefit–contractually or by any other means–by the 'commercial user' in connection with the 'technical user.'" (Doc. 283, Ex. A, p. 3.)

17. Plaintiffs and Dr. Enriquez have pointed to three Mexican Supreme Court cases in support of their "commercial user" theory. None of the cases cited is considered precedential in Mexico.

18. In *Núñez de Quintana Maria*, the Mexican Supreme Court noted: "It is fair, under the law, that whoever, for his own personal benefit or profit creates a risk towards others, is responsible for that damage." No. 3855389, Arnparo Civil Directo 1335/44, Apr. 13, 1953 (unanimously passed with four votes).

19. In *Soledad Pérez*, the Mexican Supreme Court held an electric company liable for damage to a victim who had not herself contracted with the electric company, but instead was injured on the property of the individual who contracted with the company. No. 339163, Amparo Directo 4052/54, July 20, 1956 (3-2 vote). The court held that, in

addition to the property owner, the electric company could be held liable because it produced the electricity that caused the harm. The court noted that, because the electricity itself is always linked to the damage caused, he who exploits or utilizes the energy (i.e., the electric company) is liable for the damage caused by that energy.

20. Finally, in *Cia. Mexicana de Luz y Fuerza Motriz, S.A.*, the Mexican Supreme Court noted: "Whoever uses [a dangerous] apparatus is liable for the damages caused by same . . . . This is based on the fact that such person (the one using [the dangerous] apparatus), who should have been reaping the benefits of such use, or otherwise would not have used it, is socially in the position of ensuring against any dangerous consequences arising from such use. No. 3388738, Amparo Directo 263/55, Apr. 24, 1957 (unanimously passed with five votes, Reporting Judge Gabriel Garcia Rojas). The court added that liability under Article 1913 extends not only to the person who directly or personally uses the dangerous instrument, but also to the owners of such instruments.

21. In 1970, Dr. Woodfin Butte published an article on strict liability in Mexico, discussing Article 1913 and related case law in detail. Woodfin L. Butte, Strict Liability in Mexico, 18 AM. J. COMP. L. 805, 816 (1970). Although Dr. Butte's article discusses "what constitutes 'use'" and "what

constitutes use 'by the defendant'" under Article 1913, the cases discussed in the article shed no light on the precise question at issue in this case. *Id.* at 816-19.

22. Defendant's Mexican Law Expert, Dr. Ignacio Melo, vigorously contests Dr. Enriquez's interpretation of Article 1913. According to Dr. Melo, "Article 1913 is not a wide concept and therefore it does not apply to shareholders, nor other persons or corporations, notwithstanding the destiny of its profits . . . ." (Doc. 243, Ex. 1, ¶ 12.) Dr. Melo also insists that Dr. Enriquez's interpretation, taken to an extreme, might allow liability to attach to a wide range of actors that stand to benefit indirectly from the use of a dangerous instrument.

23. Defendants insist that MarMex alone is more than adequately insured to cover any and all alleged damage claimed by Plaintiffs in this case, and Plaintiffs have presented no evidence or argument to the contrary.

24. The relevant Mexican case law provided to this court is not directly on point, and does not clarify whether a parent company that owns a majority of shares in a company can be held liable for the subsidiary's use of a dangerous instrument.

25. The doctrine of piercing the corporate veil exists in Mexico, though it is rarely used. *See, e.g.*, Humberto Gayou & Robert G. Gilbert, *Legal Building Blocks for*

Structuring Sales in the Mexican Market, 25 ST. MARY'S L.J. 1115, 1136 (1994) ("Piercing the corporate veil in Mexico is much more difficult than in the United States."), *Product Liability Claims on Both Sides of the Border: A Panel Discussion*, 8 U.S.-MEX. L. J. 123 (2000) ("The veil piercing doctrine is mostly unknown in Mexico. . . .") (panelist Carlos Loperena); Carlos Obregon & Federico Santacruz, *Private Equity*, LATIN LAWYER, Feb. 1, 2008, *available at* http://www.latinlawyer.com/article.php?id=13155 ("Except for very limited circumstances, neither Mexican law nor any judicial interpretation issued thereunder provide for the application of the 'piercing the corporate veil' theory. The main exceptions where shareholders may become liable for a company's obligations are in respect of 'irregular' companies . . . and in connection with tax liabilities of the company . . . ."); Juan Francisco Torres Landa & Mario Jorge Yanez, *Mexico* in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO ENVIRONMENT LAW 2006 (Global Legal Group 2006) ("Mexico has a very limited application of the doctrine of 'piercing the corporate veil'. . . .").[9]

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[9] In 2003, two Mexican senators submitted a draft bill for a decree to enact a Federal Law for Piercing the Corporate Veil. *See* Omar Guerrero R., Bernardo Ledesma U., & Juan Francisco Torres Landa, S.C., *Piercing the Corporate Veil in Mexico*, 26 COMP. L. YEARBOOK OF INT'L BUS. 375, 376 (2004) (noting also that "Mexican law relies excessively on form and the legal separation between shareholders and legal entities, thus allowing the abuse of

26. Plaintiffs' expert, Dr. Enriquez, insists that the veil piercing doctrine is not at all relevant to the question of whether Grupo TMM should be considered a "user" under Article 1913. (Doc. No. 283, Ex. A, at 3.) Dr. Enriquez is quite familiar with the doctrine of veil piercing. In 2001, he published a book on piercing the corporate veil that included a chapter on the reception of the doctrine in Mexican law.[10] *See* JOSE DAVID ENRIQUEZ ROSAS, LA PERSONALIDAD JURIDICA SOCIETARIA (Oxford 2001). The Court presumes that if veil piercing were appropriate under Mexican law in this case, Plaintiffs and Dr. Enriquez would have made such an argument.[11]

27. To the extent the Court is able to interpret and apply Mexican law on this point, the

corporations and the independence from their members to isolate legal liabilities. . . .") It is not clear whether this proposed bill became law. A 2006 article by one of the same authors (Juan Francisco Torres Landa) and a 2008 article describing the very limited use of the veil piercing theory in Mexico suggest that it did not. *See* Juan Francisco Torres Landa & Mario Jorge Yañez, *Mexico* in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO ENVIRONMENT LAW 2006 (Global Legal Group 2006); Carlos Obregón & Federico Santacruz, *Private Equity*, LATIN LAWYER, Feb. 1, 2008.

[10] Neither party brought this book to the Court's attention. The Court identified the book as part of its own research into foreign law, as permitted under FED. R. CIV. P. 44.1.

[11] Defendants' expert, Dr. Melo, has not addressed the question of veil piercing under Mexican law in his affidavits.

Court is persuaded by Defendant's argument that the question of whether liability extends to Grupo TMM is actually a question of veil piercing. Plaintiffs' policy argument as to why liability should extend beyond the owner of the vessel is rooted in a concern that entities might seek to avoid responsibility through sophisticated, and presumably improper, structuring of the corporate form. This concern is precisely what the doctrine of piercing the corporate veil purports to address.

28. The court finds no support in Mexican case law, code provisions, or the writings of experts for the proposition that a parent company with a majority interest in a subsidiary can be held strictly liable as a "commercial user" under Article 1913. Nor is the court persuaded by Dr. Enriquez' policy arguments regarding the purpose of Article 1913. Even assuming the facts alleged by Plaintiffs regarding the relationship between MarMex and Grupo TMM to be true, the Court finds that Grupo TMM is not a "user" under Article 1913 as a matter of law.

29. The Court additionally notes that "[w]hen the parties have failed to conclusively establish foreign law, a court is entitled to look to its own forum's law in order to fill in any gaps." *Banco de Credito Indus., S.A. v. Tesoreria General*, 990 F.2d 827, 836 (5th Cir. 1993); *see also In re Avantel, S.A.*, 343 F.3d 311, 322 (5th Cir. 2003) (upholding district court's decision to apply Texas law

instead of Mexican law where the Plaintiff failed to conclusively establish foreign law). The parties have failed conclusively to establish whether a parent company that owns 60 percent of a subsidiary may be considered a "user" under Article 1913. The Court therefore applies the law of the forum to determine whether a parent company may be held liable for the actions of its subsidiary. The relevant forum law in this case pertains to the piercing of the corporate veil.

30. The Fifth Circuit has found that the federal and Texas alter ego doctrines overlap, and has cited state and federal cases interchangeably when discussing veil piercing in the admiralty context. *See U.S. v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 690 n. 6 (5th Cir. 1985).

31. "Generally, a court will not disregard the corporate fiction and hold a corporation liable for the obligations of its subsidiary except where it appears the corporate entity of the subsidiary is being used as a sham to perpetrate a fraud, to avoid liability, to avoid the effect of a statute, or in other exceptional circumstances." *Lucas v. Texas Industries, Inc.*, 696 S.W.2d 372, 374 (Tex. 1984). In *Talen's Landing*, the Fifth Circuit observed: "It is clear that Admiralty Courts can pierce the corporate veil of a corporation in order to reach the 'alter egos' of the corporate defendant directly involved. This is especially true where the near identity of

two corporations should be disregarded in order to prevent manifest injustice to third parties, or where the separate identity of two corporations should be disregarded where one corporation becomes the conduit of another." *Talen's Landing, Inc. v. M/V Venture, II*, 656 F.2d 1 157, 1 160 (5th Cir. 198 l)(internal citations omitted)

32. Again, even presuming Plaintiffs' version of the facts to be true, the Court finds that the facts of this case do not justify piercing the corporate veil so that Grupo TMM may be held liable for the tort of its subsidiary. The alleged facts do not suggest that Plaintiffs have "fallen victim to a basically unfair device by which a corporate entity has been used to achieve an inequitable result." *See, e.g., Lucas v. Texas Industries, Inc.*, 696 S.W.2d 372, 375 (Tex. 1984); *see also Lubrizol Corp. v. Cardinal Const. Co.*, 868 F.2d 767, 771 (5th Cir. 1989) ("[I]t is clear that Texas courts simply refuse to find liability without wrong-doing by the controlling corporation.") Furthermore, the Texas courts have noted that "If the corporation responsible for the plaintiffs injury is capable of paying a judgment upon proof of liability, then no reason would exist to attempt to pierce the corporate veil and have shareholders pay for the injury." Id. Plaintiffs have made no allegation that MarMex is unable to pay a judgment upon proof of liability. Nor does the Court believe that holding Grupo TMM is necessary "to prevent manifest injustice" to Plaintiffs. *See*

Talen's Landing, 656 F.2d at 1160 (internal citations omitted).

33. Therefore, because Mexican law does not support the theory that Article 1913 may impose liability on a "corporate user" and because veil piercing is inappropriate under forum state law, Grupo TMM is not liable for the tort of its subsidiary, MarMex.

C. Causation of Damages to Spud Cans

34. Plaintiffs insist that Mexican law only requires the Court to find that they have proven the elements of their case by a preponderance or "more likely than not" standard of proof Defendants insist that the Court must find that Plaintiffs' proved each element "fully" or "beyond a reasonable doubt."

35. It is not immediately clear what standard of proof a Mexican court would apply in a civil case.

36. The Court need not decide this challenging question, however, because it finds that Plaintiff has not proven, even by a preponderance of the evidence, that the cracks discovered in the spud cans were caused by the force of the allision. Although Plaintiffs have shown that cracks in a spud can to leg connection could be caused by an allision, there is simply not sufficient evidence to establish that the particular cracks discovered in the TOTONACA spud

to leg can connections in 2004 were actually caused by the March 31, 2004 allision. An allision is not the only possible cause of the cracks discovered in 2004. Cracks were discovered in the TOTONACA7s spud cans in 2000, and there is no allegation that those cracks were caused by an allision. The Court understands that destructive testing is not required by the classification society, but it certainly would have aided Plaintiffs in proving the cause of the damage to the TOTONACA spud cans in litigation. Furthermore, Plaintiffs failed to produce an expert qualified to testify as to the possible causes of the spud can cracks. The Court therefore finds that Defendant MarMex is not liable for the cracks discovered in the TOTONACA's spud can to leg connections under Article 1913.

IV. CONCLUSION

For the reasons stated above, **JUDGMENT IS ENTERED** for Defendant Grupo TMM on all of Plaintiffs' claims. **JUDGMENT IS ENTERED** against Defendant MarMex on Plaintiffs' claims under Article 1913. In the next phase of this trial, the Court will adjudicate the extent of the damages to the TOTONACA including damages to the leg and raw water tower and the damages incurred for loss of hire.[12] Defendant MarMex is not liable under Article

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[12] Defendants have indicated to the Court that they will likely appeal this Order to the Fifth Circuit prior to the damages trial. It appears that such an appeal would be permitted under 28

1913, however, for damages related to the cracks in the TOTONACA spud can to leg connections.

IT IS SO ORDERED.

SIGNED this 2nd day of September, 2008.

/s/Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

U.S.C. § 1292(a)(3), which grants the Court of Appeals jurisdiction over "Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." To the extent that appeal of this Order is not allowed under 28 U.S.C. § 1292(a)(3), this Court would certify the Order for interlocutory appeal pursuant to 28 U.S.C. §1292(b).

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:05-cv-419
(ADMIRALTY)

[Filed March 24, 2008]

PERFORACIONES MARITIMAS MEXICANAS S.A. de C.V. and CERTAIN REINSURING UNDERWRITERS SUBSCRIBING TO REINSURANCE CONTRACT NO. AHE-030044 AS AMENDED TO NO. AHE-04004,	)
Plaintiffs,	)
v.	)
SEACOR HOLDINGS, INC., GRUPO TMM S.A. de C.V., and MARITIMA MEXICANA S.A. de C.V.,	)
Defendants.	)

MEMORANDUM AND ORDER

Pending before the Court is Defendants' Motion for Reconsideration pursuant to Federal Rule of Civil

Procedure 54(b). Defendants ask the Court to reconsider a July 21, 2006 Order on Defendant's Motion to Dismiss, Docket No. 67. After consideration of the parties' arguments and the relevant law, the Court finds that Defendants' Motion, Docket No. 197, should be **DENIED**.

I. BACKGROUND

This case involves an allision between Defendants' Mexican flagged supply vessel, the ISLA AZTECA, and Plaintiffs' Mobile Offshore Drilling Unit TOTONACA, another Mexican flagged vessel. The allision occurred on March 31, 2004 in Mexico's Bay of Campeche. Although Defendants' motion suggests that location of the allision was within the "territorial waters" of Mexico, Defendants clarify that it actually took place within Mexico's exclusive economic zone. *See* discussion *infra* Part II.A. It remains undisputed that both Plaintiff Perforaciones Maritimas Mexicanas,[1] the owner of the TOTONACA, and Defendant Maritima

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[1] PMM's underwriters are also Plaintiffs in this lawsuit. PMM stresses that its lead underwriter, Navigators Insurance Services of Texas, Inc., is a Texas corporation with its principle place of business in Houston, Texas. (Pls.' Resp. 3.) Defendants note that a subrogated underwriter steps into the shoes of its insured.

Mexicana (MarMex),[2] owner and operator of the ISLA AZTECA, were incorporated in Mexico.

On May 6, 2004, Defendant MarMex filed a petition to limit its liability in Mexico under the Convention on Limitation of Liability for Maritime Claims, and that limitation fund was established on October 27, 2004 in the amount of US$427,460.97. On May 17, 2004, Plaintiff PMM filed a criminal complaint known as a *Querella* in Mexico asking the Public Prosecutor to conduct a criminal investigation and issue an indictment against MarMex and the crew of the ISLA AZTECA. The Public Prosecutor did not find sufficient evidence of criminal conduct or criminal negligence, and declined to prosecute those charges. On July 28, 2005, Plaintiffs filed this lawsuit in the Galveston Division of the Southern District of Texas (the "Predecessor Court").

On July 21, 2006, the Predecessor Court denied Defendants' motion to dismiss on *forum non conveniens*, principles of international comity, and for lack of subject matter jurisdiction. In November 2006, the Fifth Circuit dismissed Defendants' interlocutory appeal of that Order, finding that the Order did not determine the parties' substantive rights and

[2] MarMex is 60% owned by a Mexican entity, Defendant Grupo TMM, and 40% owned by Seacor Holdings, Inc. or Seacor Marine Mexico, Inc. (SMII). At the time the original Order was entered, the parties disputed whether the stock is held by Seacor or by SMII. Recent deposition testimony indicates that MarMex has merged with TMM. (Pls.' Resp. 22 Plaintiffs.) Plaintiffs claim that Seacor exercised "significant operational control" over the ISLA AZTECA. (See Pls.' Response 23.) Plaintiffs' claims against Seacor were dismissed in July 2006.

liabilities. *See Perforaciones Exploración y Producción et al. v. Grupo TMM S.A. et al.*, No. 6-41228 (5th Cir. Nov. 30, 2006). The case was reassigned to this Court on October 26, 2007. Defendants filed the pending Motion for Reconsideration of the Predecessor Court's Order on January 7, 2008. The Court granted Plaintiffs' request for additional time to respond to the Motion, allowing them the opportunity to complete certain depositions that Plaintiffs argued might provide further evidence that Texas is a convenient forum for Defendants. The case is set for trial on April 7, 2008.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 54(b) allows the Court to reconsider "any order or other decision . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the Parties." FED. R. CIV. P. 54(b); *see also Matagorda Ventures, Inc. v. Travelers Lloyds Ins. Co.*, 208 F. Supp. 2d 687, 688 (S.D. Tex. 2001). A motion to reconsider should "clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005) (citing *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)).

The doctrine of the law of the case and the principle of judicial comity are also relevant to the Court's reconsideration of an order issued by a predecessor judge. "[W]hen a district judge has rendered a decision in a case, and the case is later transferred to another judge, the successor should not ordinarily overrule the

earlier decision." *Loumar*, 698 F.2d at 762 (citing 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4478 (1981)). However, neither the law of the case doctrine nor the principle of judicial comity "is . . . a barrier to the correction of judicial error," *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983); *see also Gallimore v. Missouri Pac. R. Co.*, 635 F.2d 1165, 1172 (5th Cir. 1981) (noting that judicial comity "should give way, if the need should arise, to the interests of justice and economy when those interests would be flouted by rigid adherence to the rule"), and the Court retains discretionary authority to reconsider a predecessor judge's decision, *see Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-18 (1988) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'"); *Loumar*, 698 F.2d at 762 (noting a successor judge's "bountiful discretion" in reviewing a predecessor judge's work, but cautioning "A judge should hesitate to undo his own work. Still more should he hesitate to undo the work of another judge. But until final judgment or decree there is no lack of power, and occasionally the power may properly be exercised." (citing *Peterson v. Hopson*, 29 N.E.2d 140, 144 (Mass. 1940)); *Abshire v. Seacoast Products, Inc.*, 668 F. 2d 832, 837-38 (5th Cir. 1982) ("The successor judge has the same discretion as the first judge to reconsider the order.").

III. ANALYSIS

A. Subject Matter Jurisdiction

In the Order, the Predecessor Court denied Defendant's motion to dismiss for lack of subject matter jurisdiction. There is no clearly controlling precedent on this question, and the Predecessor Court did not commit a manifest error of law in finding that subject matter jurisdiction existed.

In addition to the arguments presented in their original Motion to Dismiss, Defendants now argue that the United Nations Convention on the Law of the Sea ("UNCLOS"), Dec. 10, 1982,, 21 I.L.M. 1245, 1833 U.N.T.S. 3., and the Treaty on Maritime Boundaries between the United Mexican States and the United States of America (Carribbean Sea and Pacific Ocean) May 4, 1978, 2143 U.N.T.S. 405 ("Treaty on Maritime Boundaries"), preclude the United States from exercising subject matter jurisdiction over this case. It does not appear, however, that either treaty confers exclusive jurisdiction on the Mexican courts over allisions occurring within its exclusive economic zone (EEZ).[3]

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[3] Plaintiffs are correct that the United States is a signatory to UNCLOS, but has not ratified the Convention. The United States has acknowledged that the provisions of UNCLOS regarding the exclusive economic zone are declarative of customary international law, however, *see Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 305 n.14 (1st Cir. 1999); RESTATEMENT (THIRD) OF FOR. REL. LAW § 514, cmt. a, Reporter's Note 1. Additionally, as a signatory to the Convention, the United States is generally "obliged to refrain from acts that would defeat the object and purpose of the agreement," *Mayaguezanos*, 198 F.3d

UNCLOS declares that coastal state have certain sovereign rights in the EEZ, which "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." UNCLOS, art. 57. Article 56 of UNCLOS sets forth those rights:

> In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention.

UNCLOS, art. 56. Non-coastal states retain certain rights in the exclusive economic zone, as well. UNCLOS art. 58 (stating that, in the EEZ, all states

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at 305 n. 14 (citing *Kreimerman v. Casa Veerkamp, S.A. de C. V.*, 22 F.3d 634, 638 n. 9 (5th Cir. 1994); RESTATEMENT (THIRD) OF FOR. REL. LAW, pt. III, introductory note, at 145). Because the Court finds that the relevant treaties do not preclude subject matter jurisdiction, it need not reach the question of whether the Defendants have standing to assert rights under either UNCLOS or the Treaty on Maritime Boundaries.

enjoy "the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention"). Nothing in the language of UNCLOS indicates that Mexico's limited sovereign rights related to the exploration and exploitation of natural resources in the EEZ deprives the United States courts of jurisdiction over torts or collisions that occur on those waters. *See also* RESTATEMENT (THIRD) OF FOR. REL. § 511, cmt. b (noting that the "'sovereign rights' which a coastal state enjoys in its exclusive economic zone . . . are functional in character, limited to specified activities.").[4]

The Treaty of Maritime Boundaries does not compel a different conclusion. The treaty states that: "North of the maritime boundaries established by Article I, the United Mexican States shall not, and south of said boundaries, the United States of America shall not, claim or exercise for any purpose sovereign rights or jurisdiction over the waters or seabed and subsoil." Treaty of Maritime Boundaries, art. II. The Treaty of Maritime Boundaries also notes that the treaty "shall not affect or prejudice the positions of either Party with respect to "sovereign rights or jurisdiction for any other purpose." Treaty of Maritime Boundaries, art. III. Again, this language does not

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[4] The Predecessor Court also heard expert testimony to this effect prior to entering the Order. (*See* Mot. Hearing, Tr. Apr. 27, 2007, p. 59-60.)

appear to directly address the United States courts' jurisdiction over an allision between vessels in that area.

Nor did the Predecessor Court commit a manifest error of law when determining that subject matter jurisdiction was appropriate based on relevant United States case law. The Supreme Court's statement in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971), that "the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States" does appear to be *dicta*, and the Court's determination that the locality test set forth in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1999, only requires that the tort occur "on navigable waters" is not clearly erroneous.[5] Both the Supreme

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[5] The term "navigable waters of the United States" has been construed in some contexts to include the high seas. *See, e.g., Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264, 268 (5th Cir. 1986). At least prior to the creation of the concept of an EEZ, the high seas were considered to encompass "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." *Id.* (citing 1 BENEDICT ON ADMIRALTY § 141, at 9-2 (7th ed.)). The allision at issue in this case did not take place in Mexico's territorial sea, but instead in its exclusive economic zone. *Compare* UNCLOS, Part II, Sec. 2 (discussing the territorial sea) *with* UNCLOS, Part V (discussing the exclusive economic zone). Some circuits have discussed the EEZ and the high seas as separate areas. *See, e.g., Humane Soc'y of the United States v. Clinton*, 236 F.3d 1320, 1322 (Fed. Cir. 2001) There is also at least some reason to believe that the EEZ might properly be considered part of the high seas subject to the coastal state's limited sovereign rights, however. *See* RESTATEMENT (THIRD) OF FOR. REL. § 511, Reporter's Note 2 (acknowledging that UNCLOS did not expressly declare that the

Court and the Fifth Circuit have found that subject matter jurisdiction exists in cases involving collisions between two foreign vessels on the high seas, but that Courts may decline such jurisdiction on grounds such as *forum non conveniens*. *See, eg., Atlantic Transport Co. of W.Va. Imbrovek*, 234 U.S. 52, 60 (1914); *The Belgenland*, 114 U.S. 355 (1885); *Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv*, 711 F.2d 1231 (5th Cir. 1983); *see also* 1-VIII BENEDICT ON ADMIRALTY § 129 ("Admiralty courts have jurisdiction of admiralty suits entirely between foreigners when proper service can be had or property attached, but generally a court may, in its discretion, dismiss the case on grounds of forum non conveniens."); 1 THOMAS J. SCHOENBAUM ADMIRALTY & MAR. LAW § 14-9 (4th ed. 2004) (declaring that "[i]n the United States, collision jurisdiction potentially extends to the four corners of the globe, to the high seas and even foreign territorial waters," but noting that "the courts have adopted several ways of abstaining from exercising jurisdiction . . . in collision cases where justice requires"). At least one Circuit has found subject matter jurisdiction to exist where the tort occurred in the *territorial* waters of another nation, but that case involved an American plaintiff. *See Neely v. Club Med Management Services, Inc.*, 63 F.3d 166, 170 (3d Cir. 1995); *see also* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 33 (2d ed. 1975) ("Occurences on foreign

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EEZ remains part of the high seas, but noting that "the history of the negotiations indicates that they consider that the zone remains high seas, although it will be subject to exceptional rights in favor of the adjacent coastal state.") The allision at issue in this case could, therefore, at least plausibly be considered to have occurred within "the navigable waters of the United States."

navigable waters may also round admiralty jurisdiction.").

The Court is not aware of a case that addresses the precise fact scenario present in this case: namely, an *in personam* suit involving an allision between two vessels operating under the flag of the same country that occurred in that country's Exclusive Economic Zone. In the absence of clearly controlling precedent to the contrary, however, the Court cannot find that the decision to deny Defendant's motion to dismiss constituted a manifest error of law.

B. *Forum Non-Conveniens* and International Comity

Although the Court has discretion to reconsider the Predecessor Court's decision to deny Defendant's motion to dismiss on grounds of *forum non conveniens* and international comity, it does not believe that it would be in the interests of justice to do so. Given the facts of this case, this Court likely would have reached a different conclusion if it had been considering Defendant's motion to dismiss eighteen months ago. The Predecessor Court's decision on these matters was discretionary, however, and Defendants do not argue that the court applied an incorrect legal standard. Thus, it is difficult for this Court to find that the Predecessor Court' clearly committed a manifest error of law. Furthermore, it appears that some of the factors that may have weighed in favor of dismissal eighteen months ago may now tilt the other direction.[6]

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[6] The Court does agree with Defendants, however, that any questions as to whether an alternate forum exists in Mexico could

For example, Plaintiffs note that deposition testimony has been obtained from all witnesses, suggesting that difficulties in accessing sources of proof have been overcome. Plaintiffs have also provided additional evidence of Defendants' relationship with the United States that was uncovered through the discovery process. Defendants point out that the Predecessor Court made its decision on Defendant's motion to dismiss before determining that it would need to apply Mexican substantive law to the dispute. While this factor merits some weight in the balancing analysis, the Court cannot say that it renders the Predecessor Court's previous decision clearly erroneous.

The Court recognizes that Defendants have and will continue to incur costs and inconveniences that they would not have faced had this lawsuit been prosecuted in Mexico. Given the standard for a motion for reconsideration, and taking due account of the principles of judicial comity and law of the case, however, the Court declines to reconsider the Predecessor Court's decision to deny Defendant's motion to dismiss on grounds of forum non conveniens and international comity.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion for Reconsideration, Docket No. 67, is **DENIED.**

IT IS SO ORDERED.

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be resolved through a conditional order of dismissal. *See, e.g., Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv*, 711 F.2d 1231, 1239 (5th Cir. 1983).

SIGNED this 24th day of March, 2008.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-05-419

[Filed July 21, 2006]

PERFORACIONES MARITIMAS MEXICANAS S.A. de C.V., et al.,	)
Plaintiffs,	)
v.	)
SEACOR HOLDINGS, INC., SEACOR MARINE MEXICO, INC., GRUPO TMM, S.A., and MARITIMAS MEXICANA S.A. de C.V.,	)
Defendants.	)

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

This case arises out of an allision between the M/V ISLA AZTECA ("AZTECA"), a Mexican flag vessel, and the MODU TOTONACA, a drilling rig located in the Bay of Campeche, Mexico. Now before the Court are Defendant Seacor Holding, Inc.'s ("Seacor") Rule

12(b)(6) Motion to Dismiss for Failure to State a Claim or, in the alternative, Motion for Summary Judgment, Defendant Seacor's First Amended Motion to Dismiss Based on Principles of International Comity, or, in the Alternative, Motion to Dismiss Based on Plaintiff's Lack of Standing, Defendant Seacor's Motion to Dismiss for Forum Non Conveniens, and Defendants Grupo TMM, S.A. ("TMM") and Maritima Mexicana, S.A. de C.V.'s ("MarMex") Motion to Dismiss for Lack of Subject Matter Jurisdiction, or, in the Alternative Forum Non Conveniens, or, in the Alternative, International Comity. For the reasons stated below: Seacor's Motion to Dismiss for Plaintiff Perforaciones Exploracion y Produccion's Lack of Standing is **DENIED AS MOOT**. TMM and MarMex's Motion to Dismiss for Lack of Subject Matter Jurisdiction is **DENIED**. Seacor's Motion to Dismiss for Failure to State a Claim is **DENIED AS MOOT**, and its Motion for Summary Judgment is **GRANTED**, and Plaintiffs' claims against Seacor and Seacor Marine Mexico, Inc. ("SMMI") are **DISMISSED WITH PREJUDICE**. Seacor's Motions to Dismiss for Principles of International Comity and *Forum Non Coveniens* are **DENIED AS MOOT**. TMM and MarMex's Motions to Dismiss for Principles of International Comity and *Forum Non Conveniens* are **DENIED**.[1]

I. Background

This case arises out of the March 31, 2004 allision between the AZTECA, a Mexican flag supply vessel,

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[1] The Court does not consider this Order worthy of publication. Accordingly, it has not requested and does not authorize publication.

and the TOTONACA, a mobile drilling rig located in the Bay of Campeche that appears to have been fixed at the time of the accident, within the territorial waters of Mexico. The AZTECA was owned and operated by MarMex, a Mexican shipping company. MarMex is 60% owned by TMM, and, at the time of the incident giving rise to this lawsuit, 40% owned by either Seacor or SMMI.[2] TMM is also a Mexican entity. The domiciles and principal places of business of TMM and MarMex are in Mexico. The TOTONACA was owned by Perforaciones Maritimas Mexicanas S.A. de C.V. ("PMM").

On May 6, 2004, MarMex filed an Ex Parte Declaratory Judgment Proceeding against Perforaciones Maritimas Protexa S.A. de C.V. (PMM's predecessor) based on the International Convention on Limitation of Liability Arisen from Maritime Law Claims, ratified by Mexico on August 9, 1994. On May 10, 2004, the Sixth District Court in Civil Matters in the Federal District in Mexico denied MarMex's request, and MarMex appealed. On October 27, 2004, the Sixth District Court vacated its earlier ruling and entered an Order granting MarMex's request for relief. That Court ordered service of MarMex's Original Petition, exhibits and Order on Perforaciones Exploracion y Produccion ("Protexa"), PMM and Pemex Exploracion y Produccion. This action is still pending in Mexico.

On May 7, 2004, PMM filed a 'Criminal Complaint" with the Investigating Prosecutor's Office in Ciudad

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[2] The Parties dispute whether the stock is held by Seacor or by SMMI.

del Carmen, Campeche, against MarMex for damages arising from the allision. This criminal proceeding was ultimately dismissed.

On July 28, 2005, Protexa and Certain Reinsuring Underwriters Subscribing to the Reinsurance Contract Policy No. AHE-030044 as Amended to Policy No. AHE-004004 ("Underwriters") filed suit against Seacor, TMM, and MarMex for damages sustained by the AZTECA during the allision. On July 14, 2006, the Court granted Plaintiffs' Motion for Leave to File an Amended Complaint. The Amended Complaint substituted PMM for Protexa, since it is undisputed that PMM is the real party in interest, and it also added SMMI as a defendant. The Amended Complaint also eliminated the cause of action for use of a dangerous weapon pursuant to Article 1913 of the Federal Civil Code of Mexico, so the only claims remaining arise under the admiralty and maritime laws of the United States.

Now before the Court are several motions to dismiss, referenced above. As manifested by the titles of the aforementioned Motions, many of the issues raised by the individual Defendants overlap with one another. Therefore, the Motions will be considered jointly, and each ground for dismissal will be discussed once.[3]

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[3] Defense Counsel is advised that in the future, for the sake of brevity and out of consideration for the limited resources of the Court, they should seriously consider filing a single *joint* dispositive motion when there is such a commonality of interests rather than have the Court sort through four redundant motions.

II. Plaintiff Protexa's Lack of Standing

Seacor originally moved to dismiss on the ground that Protexa lacked standing to sue.[4] In its Motion, it argued that Protexa was not the true party in interest because is did not own the TOTONACA and was not a party to the drilling contract between PMM (the rig owner) and Pemex. PMM was the actual owner of the TOTONACA. Recently, Plaintiffs realized the error in their pleadings, and filed for leave to amend their Complaint. On July 14, 2006, Plaintiffs were given leave to amend, and have since filed their Amended Complaint, which substituted PMM for Protexa. At this time, it appears that all of the proper Parties have been named, and the dispute over the proper plaintiff has been resolved. Therefore, Seacor's Motion to Dismiss on the ground that Protexa lacks standing to sue is **DENIED AS MOOT**.

III. Lack of Subject Matter Jurisdiction

A. Legal Standard

District courts are powerless to exercise jurisdiction in excess of the limited jurisdiction statutorily conferred upon them by Congress. *See Margin v. Sea-Land Servs., Inc.*, 812 F.2d 973, 976 (5th Cir. 1987). A case is properly dismissed for lack of subject matter jurisdiction when a court lacks the statutory or constitutional power to adjudicate the case. *See Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984). If the defendant subsequently challenges the plaintiff's stated basis for jurisdiction, the plaintiff

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[4] No one challenged the Underwriters' standing to sue.

bears the burden of establishing that jurisdiction exists. *See Harvey Const. Co. v. Robertson CECO Corp.*, 10 F.3d 300, 303 (5th Cir. 1994); *Margin*, 812 F.2d at 976. A court's consideration of such jurisdictional disputes should, however, focus only on discerning "some discreet jurisdiction requisite," as indicated by the facts alleged in the plaintiff's complaint; the inquiry should not address the merits of the plaintiff's claim. *Green v. Ferrell*, 664 F.2d 1292, 1294 (5th Cir. 1982).

B. Analysis

In their Motion to Dismiss, TMM and MarMex contend that this court lacks subject matter jurisdiction over Plaintiffs' claims. They argue that because the allision did not occur on the navigable waters of the United States, but in Mexican waters in the Bay of Campeche, this case does not fall within the Court's admiralty and maritime jurisdiction. The Court respectfully disagrees.

The claims asserted are basic tort claims that fall within the scope of this Court's admiralty jurisdiction. "[A] party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S. Ct. 1043, 1048, 130 L. Ed. 2d 1024 (1995). Thus, the injury or incident must have occurred on navigable waters, and the general character of the activity giving rise to the incident must bear a substantial relationship to traditional maritime activity. *Id.* at 534, 115 S. Ct. at 1051. *See also Sisson v. Ruby*, 497 U.S. 358, 110 S. Ct. 2892, 111 L. Ed. 2d

292 (1990); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972). An allision between a vessel and a drilling rig on navigable waters clearly satisfies both requirements for the exercise of admiralty tort jurisdiction. *See Kim v. Frank Mohn A/S*, 909 F. Supp. 474, 476–77 (S.D. Tex. 1995) (finding admiralty and maritime jurisdiction even though plaintiff and defendant were citizens of foreign countries and the vessel was foreign-owned and foreign-flagged). TMM and MarMex's argument that a tort must have occurred on the navigable waters of the United States to fall within this Court's admiralty and maritime jurisdiction is unpersuasive. In support of their argument, they rely upon the Supreme Court's decision in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 92 S. Ct. 418, 30 L. Ed. 2d 383 (1971). In that case, the Supreme Court stated, in *dicta*, that "[t]he historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring *on the navigable waters of the United States*." *Id.* at 205, 92 S. Ct. at 421 (emphasis added). *Victory Carriers* considered the question whether state law or federal maritime law governs the suit of a longshoreman injured on a pier while moving cargo destined to be loaded on a ship. *See id.* at 202–03, 92 S. Ct. at 420. It did not involve questions of the applicability of maritime jurisdiction to accidents on foreign waters. Furthermore, the test for maritime and admiralty jurisdiction laid out in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* only requires that the tort occur on "navigable waters" rather than the "navigable waters of the United States." *See Grubart*, 513 U.S. at 534.

The Fifth Circuit has not provided a clear answer to this question. Recently, the Third Circuit noted that "a tort need not have occurred in waters under the jurisdiction of the United States for us to exercise admiralty jurisdiction." *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co. Ltd.*, 436 F.3d 349, 355, n.11 (3d Cir. 2006). Other courts have followed the *dicta* of *Victory Carriers*. *See e.g.*, *Dunham v. Hotelera Canco S.A.*, 933 F. Supp. 440, 448 (E.D. Va. 1996) (holding that the Court lacked admiralty jurisdiction over a tort that occurred in territorial waters of Mexico). Ultimately, this presents a question of policy best left to the purview of the Fifth Circuit, and this Court will follow any guidance that the Circuit might provide. In the meantime, the Court agrees with the analysis of admiralty jurisdiction as laid out in Thomas J. Schoenbaum's treatise, ADMIRALTY AND MARITIME JURISDICTION. Schoenbaum states that:

> In the United States collision jurisdiction potentially extends to the four corners of the globe, to the high seas and even foreign territorial waters.... The wide availability of jurisdiction in collision cases may encourage forum shopping to take advantage of differences in substantive law. *Blatant forum shopping, however, is a cause for concern, and the courts have adopted several ways of abstaining from exercising jurisdiction or of applying general maritime or foreign law in collision cases where justice requires.*

Arthur J. Schoenbaum, ADMIRALTY AND MARITIME LAW, § 14-9, at 131 (4th ed. 2004). One of the primary methods of abstention in cases such as these is the doctrine of *forum non conveniens*. *See id.* (noting that

the application of *forum non conveniens* "is particularly relevant in a case where the dispute is between parties and vessels of foreign nationalities [or where] the collision occurred in international or foreign waters..."). This case meets the standard set forth in *Grubart*. Admiralty jurisdiction exists, and concerns about whether this Court is the proper forum is best left to choice of law analysis and the applicability of the *forum non conveniens* doctrine.[5]

Therefore, TMM and MarMex's Motion to Dismiss for Lack of Subject Matter Jurisdiction is respectfully **DENIED**.

IV. Seacor Holding, Inc.'s Fed. R. Civ. P. 12(b)(6) Motion to Dismiss for Failure to State a Claim, or, in the Alternative, Motion for Summary Judgment

Seacor next argues that the lawsuit against it should be dismissed on the ground that Plaintiffs have failed to allege sufficient facts to support any of their claims against Seacor because Seacor did not own any stock in MarMex, the owner and operator of the

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[5] TMM and MarMex also argue that this Court lacks diversity jurisdiction because Parties on both sides are Mexican citizens. PMM is a Mexican corporation, and TMM and MarMex are both Mexican corporations. The Court finds that complete diversity is lacking, and the only basis for jurisdiction in this case is this Court's admiralty and maritime jurisdiction. *See Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp.*, 506 F.2d 757, 758 (5th Cir. 1975) (finding no diversity jurisdiction in a suit brought by an alien against a citizen of a state and another alien). Additionally, both Seacor and Plaintiff Underwriters have their principal place of business in Texas.

AZTECA. Seacor alleges that SMMI is the actual shareholder of MarMex, along with TMM. Alternatively, Seacor argues that it is entitled to summary judgment because even if it is a shareholder of MarMex, as a shareholder it cannot be held liable for the acts of the corporation, and MarMex is a Mexican corporation. The Court finds that whether Seacor or SMMI is the appropriate shareholder is a moot point. As shareholders of a corporation, they are insulated from liability. Plaintiffs have failed to raise any question of fact to suggest otherwise.

A. Motion to Dismiss for Failure to State a Claim Pursuant to Fed. R. Civ. P. 12(b)(6)

A party is entitled to dismissal under Fed. R. Civ. P. 12(b)(6) when an opposing party fails to state a claim upon which relief may be granted. When considering a motion to dismiss for failure to state a claim, the Court accepts as true all well-pleaded allegations in the complaint and views them in the light most favorable to the plaintiff. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (noting that a court must construe the complaint liberally in favor of the plaintiff); *see also Malina v. Gonzales*, 994 F.2d 1121, 1125 (5th Cir. 1993). A motion to dismiss should be granted only when it appears without a doubt that a plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 998, 152 L. Ed. 2d 1 (2002). *See also Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). "A motion to dismiss under Rule 12(b)(6) is

viewed with disfavor and is rarely granted." *Collins*, 224 F.3d at 498.

B. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552–53, 91 L. Ed. 2d 265 (1986). The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. The non-moving party must come forward with "specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The court must view all evidence in the light most favorable to the non-movant. *See, e.g., Broussard v. Parish of Orleans*, 318 F.3d 644, 650 (5th Cir. 2003). If the evidence would permit a reasonable fact finder to find in favor of the non-moving party, summary judgment should not be granted. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

C. Analysis

Seacor claims that it is entitled to dismissal because Plaintiffs failed to allege any facts supporting liability against it. In the alternative, Seacor argues that there is no genuine issue of material fact on any

of Plaintiffs' claims and it seeks summary relief pursuant to FED.R.CIV.P. 56. First, Seacor claims that it does not own and has not owned stock in MarMex, but that the stock in MarMex is actually held by SMMI. Second, that even if it did own stock in MarMex, it is insulated from liability because MarMex is a corporation.

Plaintiffs originally brought suit against Seacor and not SMMI. However, since Seacor filed its 12(b)(6) Motion, Plaintiffs moved for leave to amend their Complaint in part to add SMMI as a Defendant. On July 14, 2006, Plaintiffs were given leave to amend, and they have since filed their Amended Complaint, which added SMMI as a defendant. In their Amended Complaint, Plaintiffs allege that MarMex is a joint venture of Seacor and TMM, or alternatively, SMMI and TMM, and that Defendants are jointly and severally liable for the negligent acts, omissions, and breach of warranty alleged on the basis that Defendants constituted a single business enterprise, carrying out a common business objective. Plaintiffs allege that their claims are imputable to Seacor and TMM, or alternatively SMMI and TMM because they were all mutual agents and principals in the operations of the AZTECA. Plaintiffs only theory for imputation is that MarMex is a joint venture.

The declarations of Seacor Vice President John Gellert, MarMex Deputy Director Carlos Alberto Lopez Madujano, and the TMM Legal Director Marco Flavio Rigada Soto demonstrate two things. First, that MarMex was owned by two shareholders: SMMI and TMM. Second, that MarMex is a Mexican corporation, formed on March 16, 1961 under the laws of Mexico as a Mexican shipping company. Although Plaintiffs

refer to numerous publications from the Internet in support of their arguments that MarMex is a joint venture and that Seacor owned stock in MarMex, these documents are not enough to create a genuine issue of fact as to MarMex's corporate status. As the Court has previously stated, "information obtained from the Internet is 'inherently untrustworthy.'" *Barbour v. Head*, 178 F. Supp. 2d 758, 760 n.3 (S.D. Tex. 2001) (quoting *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774 (S.D. Tex. 1999)). At this stage, allegations on the Internet, without more, are not enough to create a genuine issue of material fact regarding MarMex's ownership and corporate status. The Court finds that MarMex is a Mexican corporation. Plaintiffs have not alleged that the corporate veil should be pierced in this instance. *See Baker v. Raymond Int'l, Inc.*, 656 F.2d 173, 179–80 (5th Cir. 1981) (explaining that in a maritime tort action, a plaintiff generally has recourse against the corporate entity that incurred the liability and not its parents, stockholders or other parties connected with the entity). Additionally, Plaintiffs have produced no evidence indicating that the corporate veil should be pierced in this case, or that MarMex is inadequately insured. Therefore, Seacor's Motion for Summary Judgment is hereby **GRANTED**, and Plaintiffs' claims against Seacor and SMMI are **DISMISSED WITH PREJUDICE**. Seacor's remaining Motions to Dismiss on the grounds of international comity and forum non conveniens are **DENIED AS MOOT**.

V. International Comity

TMM and MarMex next move for dismissal on the ground of ground of international comity, which is the "recognition which one nation allows within its

territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S. Ct. 139, 143, 40 L. Ed. 95 (1895). *See also Societe Nationale Industrielle Aeropatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 543 n.27, 107 S. Ct. 2542, 2556, 96 L. Ed. 2d 461 (1987); *In Re French*, 440 F.3d 145, 152-53 (4th Cir. 2006); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 63 (S.D. Tex. 1994). It "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton*, 159 U.S. at 163–64, 16 S. Ct. at 143.

In making a determination as to whether to exercise such discretion, courts have generally referred the factors listed in RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987). *See In Re French*, 440 F.3d at 153 (collecting cases); *Sequihua*, 847 F. Supp. at 63. Those factors include: (1) the link between the regulating state and the relevant activity; (2) the connection between that state and the person responsible for the relevant activity; (3) the nature of the regulated activity and its importance to the regulating state; (4) the effect of regulation on justified expectations; (5) the significance of regulation to the international system; (6) the extent of other nations' interests; and (7) the likelihood of conflict with other nations' regulations. *See* REST. (THIRD), *supra*, § 403(4). *See also In Re French*, 440 F.3d at 153. In *Sequihua v. Texaco, Inc.*, the Southern District of Texas applied a somewhat simpler list of factors, including: (1) whether the defendant sought to be sued in the United States has consented to jurisdiction in

the foreign forum; (2) the location of the alleged wrong and extent to which it takes place in a foreign state; (3) residence of the parties; (4) enforcement of a judgment entered by the United States forum; (5) interest of the foreign state in exercising its sovereign right to regulate its own environment and resources; and (6) whether the foreign nation's law conflicts with United States law. *See Sequihua*, 847 F. Supp. at 63 (citing *Timberlane Lumber Co. v. Bank of America Nat'l Trust and Savings Assn.*, 749 F.2d 1378 (9th Cir. 1984). Applying all of these factors, the Court finds that principles of international comity do not warrant dismissal.

On the one hand, the allision and damages occurred in Mexican waters, between a Mexican vessel and a Mexican rig, owned by Mexican corporations. Parties on both sides are Mexican citizens, and the Mexican courts would have jurisdiction over all the Parties in this case. Finally, Mexico clearly has an interest in regulating torts that occur within its territorial waters. On the other hand, there has been no persuasive argument made by TMM and MarMex that there would be problems enforcing a judgement entered by this Court, or that there are any substantial conflicts with Mexican law. Plaintiffs' Amended Complaint only alleges causes of action arising under the general maritime law of the United States. There is no indication that this Court will be called upon to interpret or apply Mexican law. Although there have been other proceedings involving these Parties in Mexico, there is no indication at this time that those proceedings conflict with the lawsuit filed in this Court.

While the facts of this case present a close question, TMM and MarMex have failed to show that the principles of international comity should disrupt Plaintiffs' choice of forum. Therefore, TMM and MarMex's Motion to Dismiss on the ground of international comity is respectfully **DENIED**.

VI. Forum Non Conveniens

Finally, TMM and MarMex have moved to dismiss on the ground of *forum non conveniens*. The doctrine of *forum non conveniens* derives from the proposition that "[i]n rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722, 116 S. Ct. 1712, 1724, 135 L. Ed. 2d 1 (1996). Pursuant to this doctrine, a court may dismiss a case in favor of a foreign forum if the defendant establishes that the convenience of the parties and the court, coupled with the interests of justice, indicate that the lawsuit is better suited for adjudication elsewhere. *See Karim v. Finch Shipping Co., Ltd.*, 265 F.3d 258, 268 (5th Cir. 2001).

Federal courts employ a two-part analysis when applying the *forum non conveniens* doctrine in the international context. *See Piper Aircraft v. Reyno* 454 U.S. 235, 255-56, 102 S. Ct. 252, 265–66, 70 L. Ed. 2d 419 (1981). The first step involves a determination of whether an adequate and available foreign forum exists. *See Sydow v. Acheson & Co.*, 81 F. Supp. 2d 758, 768 (S. D. Tex. 2000). Next, if an adequate alternative forum is available, the court must decide whether "certain private and public interest factors weigh in favor of dismissal." *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 424 (5th Cir. 2001). If

the relevant private interest factors advocate dismissal, however, no inquiry into the public interest factors in needed. *See Baris v. Sulpicio Lines*, 932 F.2d 1540, 1550-51 (5th Cir. 1991). While undertaking both steps of this analysis, courts must remain mindful that "the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient." *Piper Aircraft*, 454 U.S. at 256, 102 S. Ct. at 266. *See also Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 827 (5th Cir. 1986). The "*forum non conveniens* determination is committed to the sound discretion of the trial court." *Piper Aircraft*, 454 U.S. at 266 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511-12 (1947)).

The private factors to be considered in a *forum non conveniens* analysis relate to the convenience of the parties, and include: the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of viewing the premises, if such viewing would be appropriate to the action; other practical problems that make a trial of a case easy, expeditious, and inexpensive; enforceability of judgment; and whether the plaintiff has sought to vex, harass, or oppress the defendant. *See Karim*, 265 F.3d at 268 n.14 (citations omitted). The "public interest" factors include: administrative difficulties; reasonableness of imposing jury duty on the people of the community; holding the trial in the view of those affected; and the local interest in having localized controversies decided at home. *See id.*

A. Adequate and Available Forum

Defendant argues that Mexico presents an adequate alternative forum for the adjudication of this dispute. The Parties have previously availed themselves of the Mexican legal system or are subject to jurisdiction in the Mexican courts. There is no indication that Mexican law would not allow redress of any of the claims alleged by Plaintiff. Generally, an alternative forum is available to the plaintiff when the foreign court can assert jurisdiction over the litigation sought to be dismissed. *See Piper*, 454 U.S. at 254 n. 22, 102 S. Ct. at 265 n. 22 (citation omitted) ("Ordinarily, [the requirement] will be satisfied when the defendant is amenable to process in the other jurisdiction"). The alternative forum is adequate as long as the parties will be treated fairly and will not be deprived of all remedies there. *See Sydow*, 81 F. Supp. 2d at 768. *See also Piper*, 454 U.S. at 254 n. 22, 102 S. Ct. at 265 n. 22. Plaintiff has not presented, and the Court is not aware of, any obstacles to justice within the Mexican court system. Accordingly, the Court finds that Mexico is an available and adequate forum for litigation of this matter.[6]

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[6] The Court notes that Plaintiffs' argument that Plaintiff Underwriters would not be subject to jurisdiction of the Mexican courts is doubtful, and Plaintiffs offer no support for this argument other than the indication that Plaintiff Underwriters claim not to consent. If Plaintiff Underwriters choose to insure Mexican companies, they cannot complain when they are haled into court in Mexico.

B. Private Interests

Although an adequate and available forum exists, the private interest factors in this case do not compel dismissal. Any documentary evidence needed in the preparation and presentation of this case can be transferred between Mexico and Texas with relative ease, so that bears no burden on this *forum non conveniens* analysis. Additionally, Plaintiffs have shown that many of the relevant documents have already been produced, and they have been translated. While the cost and ability of obtaining testimony and attendance of both willing and unwilling witnesses weighs somewhat in favor of a Mexican adjudication, Plaintiffs have identified several witnesses amenable to this Court's jurisdiction, and most, if not all, of the witnesses in this case will likely be within the employ of the Parties, and their attendance at trial can be compelled. There has been no showing that Plaintiffs sought this forum to vex or harass Defendants.

Plaintiffs have shown that the distance between the location of the vessels involved in this allision and the location of the Parties is equally inconvenient whether this matter is tried in Mexico or tried in Galveston. Additionally, trial in this case is set for September 11, 2006. The Motions now before the Court did not become ripe until June 16, 2006, a mere three months away from trial. This matter would be significantly delayed if it were dismissed to be refiled in Mexico at this late stage. Thus, the Court finds that private interest factors do not support dismissal for *forum non conveniens*.

3. Public Interest

Courts often turn to the interests of the public when considering an argument of *forum non conveniens*. The "public interest" factors include: administrative difficulties, such as burdening court dockets; the reasonableness of imposing jury duty on the people of the community; holding the trial in the view of those affected; and the local interest in having localized controversies decided at home. *See Karim*, 265 F.3d at 268 n.14 (citations omitted).

Although this Court has substantial docket obligations, it is by no means too much of a burden to handle this case, and thus far no administrative difficulties have presented themselves. Next, this case is not set for the Court's jury docket, so it will not be imposing the burden of jury duty on the citizens of this Division. Furthermore, Plaintiffs have amended their complaint to only allege causes of action arising under the general maritime laws of the United States, which this Court is aptly suited to render judgment upon. While the Court concedes that Mexico clearly has an interest in having this controversy decided in its own courts, that alone is not enough to warrant dismissal. The public interest factors in this suit do not warrant dismissal based on the doctrine of *forum non conveniens*.

TMM and MarMex have failed to show that trial would be more convenient in Mexico. Therefore, TMM and MarMex's Motion to Dismiss on the ground of *forum non conveniens* is respectfully **DENIED**.

V. Conclusion

The Court thanks both Parties for the excellent advocacy displayed in the well-prepared, albeit numerous, briefs submitted in connection with this Motion. For the reasons stated above, the Court orders that: (1) Seacor's Motion to Dismiss on the ground that Protexa lacks standing to sue is **DENIED AS MOOT**; (2) TMM and MarMex's Motion to Dismiss for Lack of Subject Matter Jurisdiction is respectfully **DENIED**; (3) Seacor's Motion for Summary Judgment is hereby **GRANTED**, and Plaintiffs' claims against Seacor and SMMI are **DISMISSED WITH PREJUDICE**; (4) Seacor's remaining Motions to Dismiss for Principles of International Comity and *Forum Non Conveniens* are **DENIED AS MOOT**; (5) TMM and MarMex's Motion to Dismiss on the ground of International Comity is **DENIED**; and (6) TMM and MarMex's Motion to Dismiss for *Forum Non Conveniens* is **DENIED**. All taxable costs, expenses and attorneys' fees shall be borne by the Party incurring same.

IT IS SO ORDERED.

DONE this 21st day of July, 2006, at Galveston, Texas.

/s/ Samuel B. Kent
Samuel B. Kent
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C. A. NO. G-05-419
ADMIRALTY

[Filed July 17, 2006]

PERFORACIONES EXPLORACIÓN Y PRODUCCIÓN and CERTAIN REINSURING UNDERWRITERS SUBSCRIBING TO REINSURANCE CONTRACT NO. AHE-030044 AS AMENDED TO NO. AHE-04004,	)
Plaintiffs,	)
VS.	)
SEACOR HOLDINGS, INC., GRUPO TMM, S.A., and MARÍTIMAS MEXICANAS, S.A. de C.V.,	)
Defendants.	)

ORDER

Before the Court is Plaintiff Perforaciones Exploración y Producción, et al.'s Opposed First

Motion for Leave to File Amended Complaint. The Court, after considering the motion and response thereto and arguments of counsel, is of the opinion that Plaintiffs' motion is meritorious; it is therefore,

ORDERED that Plaintiffs' Opposed First Motion for Leave to File Amended Complaint is GRANTED.

ORDERED this 14th day of July, 2006.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-41228

[Filed December 28, 2006]

PERFORACIONES EXPLORACIO 'N Y PRODUCCIO 'N, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing To Reinsurance Contract No AHE-030044 As Amended to No AHE-04004	)
Plaintiffs - Appellees	)
v.	)
GRUPO TMM SA; MARITIMAS MEXICANAS SA DE CV, also known as MarMex	)
Defendants - Appellants	)

D.C. Docket No. 3:05-CV-419
Appeal from the United States District Court for the Southern District of Texas, Galveston.

Before KING, BARKSDALE, and GARZA, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the appeal is dismissed for lack of jurisdiction.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE : DEC 22 2006

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: /s/ _____
Deputy

New Orleans, Louisiana DEC 22 2006

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 06-41228

(Summary Calendar)

[Filed December 28, 2006]

PERFORACIONES EXPLORACIO 'N Y PRODUCCIO 'N, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing To Reinsurance Contract No AHE-030044 As Amended to No AHE-04004

Plaintiffs-Appellees

versus

GRUPO TMM SA; MARITIMAS MEXICANAS SA DE CV, also known as MarMex

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:05-CV-00419

Before KMG, BARKSDALE, and GARZA, Circuit Judges.

PER CURIAM:*

This case arises out of the March 2004 allision of the M/V ISLA AZTECA, a Mexican flagged supply vessel, with the TOTANCA, a Mexican flagged mobile offshore drilling unit located in the Bay of Campeche, Mexico. The AZTECA was owned and operated by Maritimas Mexicanas S.A. de C.V. ("MarMex"), a Mexican shipping company partially owned by Grupo TMM, S.A. ("TMM") (collectively, "Appellants"). The TOTANCA was owned by Perforaciones Maritimas Mexicanas, S.A. de C.V. ("PMM"). As a result of the allision, MarMex filed a limitation of liability action in Mexico, and a limitation fund was established in October 2004.

In July 2005, Perforaciones Exploracion y Production ("Protexa") and certain reinsuring Underwriters subscribing to Reinsurance Policy No. AHE 030044 as Amended to Policy No. AHE-04004 (the "Underwriters") (collectively, "Appellees") filed this suit in the United States District Court for the Southern District of Texas in Galveston for damages sustained by the TOTANCA during the allision.[1] Appellants filed a motion to dismiss the suit on three grounds: lack of subject matter jurisdiction,

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R 47.5.4.

[1] PMM was later substituted for Protexa as the real party in interest.

international comity, and *forum non conveniens*.[2] On July 21, 2006, the district court issued an order denying Appellants' motion to dismiss, ruling that the suit fell within the court's admiralty jurisdiction, that the principles of international comity did not warrant dismissal, and that dismissal based on *forum non conveniens* was also unwarranted.

Appellants filed a notice of appeal pursuant to 28 U.S.C. § 1292(a)(3), which provides for federal appellate jurisdiction over interlocutory decrees "determining the rights and liabilities of the parties to admiralty cases." 28 U.S.C. § 1292(a)(3). Appellees move to dismiss the appeal, arguing that the district court's denial of Appellants' motion to dismiss is not an appealable interlocutory order because it is not a "decree . . . determining the rights and liabilities of the parties" within the meaning of § 1292(a)(3). Appellants disagree. According to Appellants, the district court's order determines their rights because it "denies [their] substantive right to limit their liability and further denies [their] substantive right to have claims arising out of the allision at issue heard and determined in Mexico under Mexican law." Appellants assert that the order "ignores the Mexican limitation action" and effectively increases the Mexican limitation fund by subjecting Appellants to potential liability in the United States. Therefore, Appellants argue, the order ignores and/or extinguishes their substantive right to limit their liability under Mexican law.

[2] Appellants subsequently filed a notice and motion to apply Mexican law pursuant to Federal Rule of Procedure 44.1. This motion remains pending in the district court.

"'To be appealable under section 1292(a)(3), the decree must determine the substantive rights and liabilities of the parties to the case." *Francis ex rel. Francis v. Forest Oil Corp.*, 798 F.2d 147, 149 (5th Cir. 1986). Courts construe this jurisdictional grant narrowly. *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 564 (5th Cir. 1981); *accord Blue Water Yacht Club Ass'n v. New Hampshire Ins. Co.*, 355 F.3d 139, 141 (2d Cir. 2004). Even if an order has important procedural consequences, it is not appealable under § 1292(a)(3) if it does not determine the parties' substantive rights and liabilities. *In re Ingram Towing Co.*, 59 F.3d 513, 517 (5th Cir. 1995).

The district court's denial of Appellants' motion to dismiss did not determine Appellants' substantive rights or liabilities. The district court did not decide whether Appellants were entitled to limit their liability under Mexican law, nor would such a determination be appealable under § 1292(a)(3), given that the underlying issue of liability has yet to be determined. *See Bucher-Guyer AG v. M/V Incotrans Spirit*, 868 F.2d 734, 735 (5th Cir. 1989) (holding that "[t]he decision whether the $500 COGSA limitation on damages applies in this case is not a decision determining the rights and liabilities of the parties"). What the district court decided was that the suit fell within the court's admiralty jurisdiction and that the suit could be heard in Galveston, Texas. Such decisions do not determine the rights or liabilities of the parties for purposes of § 1292(a)(3). *See Austracan (USA.), Inc. v. M/V Lemoncore*, 500 F.2d 237, 240 (5th Cir. 1974) ("Denial of a motion to dismiss for lack of admiralty jurisdiction does not decide the parties' rights so as to be within the statute . . . authorizing interlocutory

appeals in admiralty from orders that determined rights and liabilities of parties.") (citing *Jack Nielson, Inc. v. Tug Peggy*, 428 F.2d 54, 55 (5th Cir. 1970) (holding that "[t]he district court's denial of the motion to dismiss for lack of jurisdiction did not decide the parties' rights and liabilities within the meaning of the statute" because "[i]t did not go to the merits of the claim")). Accordingly, this Court does not have jurisdiction to hear this interlocutory appeal under § 1292(a)(3).

Appellees' motion to dismiss the appeal is GRANTED, and the case is REMANDED to the district court for further proceedings.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-05-419

[Filed May 10, 2007]

PERFORACIONES MARÍTIMAS MEXICANAS S.A. de C.V., et al.,	)
Plaintiffs,	)
v.	)
GRUPO TMM, S A de C.V., et al.,	)
Defendants.	)

ORDER

This case arises out of an allision between the M/V ISLA AZTECA ("Azteca") and the Mobile Offshore Drilling Unit Totonaca ("Totonaca"), which occurred in the Bay of Campeche, Mexico on March 31, 2004. Plaintiff Perforaciones Marítimas Mexicanas, S.A. de C.V. ("PMM") was the owner and operator of the Totonaca, and Defendant Marítima Mexicana S.A. de C.V. ("MarMex") was the owner and operator of the Azteca. Defendants Grupo TMM S A. de C.V. ("TMM")

and MarMex filed an Opposed Motion and Notice to Apply Mexican Law and an Opposed Motion for Summary Judgment and Transfer to Mexico's Sixth District Court in Civil Matters of the First Circuit, along with various Supplements and Exhibits. Plaintiffs PMM and Certain Reinsuring Underwriters Subscribing to Reinsurance Contract No. AHE-030044 as Amended to No. AHE-04004 ("Underwriters") filed a Response to the Motions, and MarMex and TMM filed a Reply. All of the briefing has been excellent. Plaintiffs then filed a Surreply. MarMex and TMM also filed a Supplement to their Reply. For the reasons outlined below, Defendants' Motions are **DENIED**.[1]

I. Background[2]

The allision between the Azteca and the Totonaca occurred on March 31, 2004. The Azteca, a Mexican flagged supply vessel, was owned and operated by MarMex on the date of the allision, and TMM owned 60% of MarMex. Both TMM and MarMex are Mexican entities. The Totonaca, a Mexican flagged mobile drilling rig that was affixed to the floor of the Bay of Campeche at the time of the allision, was owned and operated by PMM, a Mexican corporation.

On May 6, 2004, MarMex filed a petition in Mexico to limit its liability for the allision (the "Mexican

[1] The Court does not consider this Order worthy of publication. Accordingly, it has not requested and does not authorize publication.

[2] A more detailed procedural history is outlined in the Order on Defendants' Motion to Dismiss, which is hereby incorporated by reference.

Limitation") pursuant to the International Convention on Limitation of Liability for Maritime Claims, London 1976 (the "London Convention"), which was ratified by Mexico in the Mexican Navigation Act of 1994. This proceeding resulted in the establishment of a limitation fund for all parties claiming damages arising from the Bay of Campeche allision.

On May 26, 2004, PMM's predecessor initiated a *Querella*, which is a criminal complaint or accusation for an alleged or suspected criminal offense, against MarMex and the crew of the Azteca in Cuidad del Carmen, Mexico. The *Querella* was eventually dismissed after an investigation indicated there was no evidence of criminal conduct.

On July 28, 2005, PMM's predecessor filed this lawsuit seeking damages for negligence, gross negligence, and unseaworthiness. In Defendants' answer, they claimed that the Mexican Limitation applies to this case. They then filed a Motion to Dismiss based on international comity and *forum non conveniens*, in which they argued that the *Querella* and the Mexican Limitation action conflicted with this case. The Court found that "there have been other proceedings involving these Parties in Mexico, [but] there is no indication at this time that those proceedings conflict with the lawsuit filed in this Court." Order on Defendants' Motion to Dismiss at 13. TMM and MarMex filed a Notice of Appeal to the Fifth Circuit on July 31, 2006. On November 30, 2006, the Fifth Circuit dismissed the appeal for lack of jurisdiction.

In the meantime, TMM and MarMex filed a Motion for Summary Judgment. They also gave the Court

notice that they intended to raise an issue concerning the law of Mexico pursuant to Federal Rule of Civil Procedure 44.1 by filing a Motion and Notice to Apply Mexican Law. A hearing on the Motion and Notice to Apply Mexican Law was held on February 15, 2007, and the Parties indicated they were having settlement discussions. The case was stayed until March 2, 2007 pending these discussions. On March 2, 2007, the Parties appeared before the Court at a Status Conference and stated that they were unable to settle. They also indicated that a Hearing in which the Court heard testimony from the Parties' perspective experts on Mexican law may be helpful to the Court's ultimate resolution of the Motions. The Court agreed, and said Hearing occurred on April 27, 2007 ("Second Hearing").

The Court was honored to hear the testimony of two renowned experts on Mexican Law during the Second Hearing. Defendants' expert, Ignacio Ruiz Melo ("Dr. Melo"), has been practicing admiralty law in Mexico for over fifty years. Dr. Melo has a rich ancestoral history in the field, as he is the fourth generation in his family to practice admiralty law in Mexico, and his son, who is also an admiralty lawyer, is the fifth. He has been a professor of maritime law and the law of the sea since 1969, and he has served as the Dean of two different Mexican law schools. He has also been a consultant to the Mexican Delegation in several Congresses and Diplomatic Conferences on Maritime Law. In fact, Dr. Melo was the only practicing maritime lawyer on the Mexican commission that promulgated the Navigation Act of 1994.

Plaintiffs' expert, Jose David Enriquez Rosas ("Dr. Enriquez"), has been practicing law since 1997, and he works for a law firm in which he is the head of the section dealing with admiralty and maritime law. He has written eight textbooks about various admiralty issues, and Dr. Melo wrote complimentary introductions in three of Dr. Enriquez's books. Dr. Enriquez has acted as legal advisor to the Government of Mexico since 2000. He was responsible for collecting the drafts of the 2006 Navigation Act and is responsible for the coordination and development of regulations arising from that Act. He is a research fellow at two universities and sometimes teaches maritime law. Dr. Enriquez has an LLM from Spain and England and a Ph.D. from Mexico, all in maritime law. In over sixteen years on this Bench, the Court has rarely had the privilege of such extraordinarily qualified experts testifying on such an interesting subject.

II. Motion to Apply Mexican Law

A. Legal Standard

The question of whether United States or foreign substantive law applies to a maritime injury case is "made pursuant to a multifactored analysis set out in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953) and further elaborated in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 90 S. Ct. 1731, 26 L. Ed. 2d 252 (1970)." *Schexnider v. McDermott Int'l, Inc.*, 817 F.2d 1159, 1161 (5th Cir. 1987). Under these cases, the following eight factors determine the choice of law: (1) the allegiance or domicile of the plaintiff; (2) the place of the contract; (3) the allegiance of the defendant shipowner; (4) the law of the flag; (5) the

accessibility of the foreign forum; (6) the place of the wrongful act; (7) the law of the forum; and (8) the defendant shipowner's base of operations. These factors, while potentially suggestive of a mechanical approach to determining choice of law, are not all of equal or even comparable significance. *See Rhoditis*, 398 U.S. at 308–09, 90 S. Ct. at 1733–34;*Schexnider*, 817 F.2d at 1161. Generally, the law of the flag and the defendant shipowner's base of operations weigh most heavily in the determination. *See Lauritzen*, 345 U.S. at 583, 73 S. Ct. at 929 (stating that the law of the flag is of "cardinal importance" in determining applicable law); *Rhoditis*, 398 U.S. at 309–10, 90 S. Ct. at 1734–35 (holding that the defendant's New York base of operations favored U.S. law despite the ship's Greek flag). On the other hand, the place of the wrongful act and the inaccessibility of a foreign forum are seldom relevant to a maritime choice-of-law determination. *See Lauritzen*, 345 U.S. at 582, 73 S. Ct. at 929 ("The test of location of the wrongful act or omission . . . is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate."); *id.* at 589–90, 73 S. Ct. at 932 (finding an argument that justice required "adjudication under American law to save seamen expense and loss of time in returning to foreign forum" unpersuasive). The national interests to be served by the application of U.S. law may also influence the weight to be assigned each factor. *See Schexnider*, 817 F.2d at 1161 (citing *Rhoditis*, 398 U.S. at 308–09, 90 S. Ct. at 1733–34).

B. Analysis

TMM and MarMex claim the *Lauritzen Rhoditis* factors overwhelmingly require to application of

Mexican law. PMM and the Underwriters, on the other hand, claim that the *Lauritzen Rhoditis* factors favor U.S. law.[3]

1. Place of the Wrongful Act

The first factor a court considers in a *Lauritzen-Rhoditis* analysis is the place of the wrongful act. TMM and MarMex claim that the allision took place in Mexican waters and, specifically, within the Exclusive Economic Zone ("EEZ") of Mexico. Plaintiffs agree that the allision occurred within the Mexican EEZ, but they assert that the EEZ merely gives Mexico the right "to exercise exclusive control over economic matters involving fishing, the seabed, and the subsoil," but not the right to exclusive control over navigation. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 965 n.3 (4th Cir.), *cert. denied*, 528 U.S. 825, 120 S. Ct. 74, 145 L. Ed. 2d 63 (1999). Because the accident did not occur in Mexican territorial waters, Plaintiffs argue that the place of the wrongful act is of minimal importance.

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[3] PMM and the Underwriters also assert that Defendants must establish that a conflict exists between the applicable Mexican substantive law and U.S. substantive law before the Court conducts a choice of law analysis. In support of this assertion Plaintiffs cite a Fifth Circuit case about whether Texas must recognize an English judgment, which is inapposite. *See Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 332–33 (5th Cir. 2002) (quoting *Hunt v. BP Exploration Co.*, 492 F. Supp. 885, 910 (N.D. Tex. 1980)). Plaintiffs have not presented the Court with any Fifth Circuit authority indicating that Defendants are required to present the Court with the provisions of foreign substantive law that are in conflict with U.S. substantive law before a *Lauritzen-Rhoditis* analysis is conducted.

The Court acknowledges that the accident occurred in the EEZ of Mexico, which may not be technically within Mexican territorial waters. However, the "place of the wrongful act" factor should not be disregarded on such a technicality. Even though the wrongful act did not occur within Mexico, it occurred approximately 46 miles off the coast of Mexico in the Bay of Campeche. This location is substantially closer to Mexico than it is to the United States, and this factor should thus weigh in favor of applying Mexican law.

2. The Law of the Flag

Next the Court considers the law of the flag, which is "of cardinal importance" in the *Lauritzen-Rhoditis* analysis. *Lauritzen*, 345 U.S. at 584. Both the Azteca and the Totonaca are Mexican flagged. Plaintiffs argue that this factor should not weigh "too heavily in favor of applying the law of Mexico" because the Azteca has substantial contacts with the United States. Plaintiffs cite *Rhoditis* in support of this assertion. In *Rhoditis*, the Supreme Court held that the law of the United States should apply even though the flag, the seaman's nationality, and the contract all weighed in favor of Greek law. *See Rhoditis*, 398 U.S. at 308–10, 90 S. Ct. at 1733–34. The Supreme Court stated that these factors were "minor weights in the scales compared with the substantial and continuing contacts that [the shipowner] ha[d] with this country." *Id.* at 310, 90 S. Ct. at 1734. Here, Plaintiffs claim that the Azteca was operating under a U.S. flag until 2004 and continues to maintain significant contacts with the United States, but they did not provide the Court with any evidence of the alleged significant contacts. In *Rhoditis*, the vessel and its sister ships

"were earning income from cargo originating or terminating" in the United States. *Id.* Here, Plaintiffs claim that the Azteca may have been operating under a Mexican "flag of convenience" at the time of the accident. However, the only additional evidence offered in support of this assertion is that the Azteca was purchased by a U.S. company for $1. Plaintiffs have failed to make a showing that the contacts the Azteca had with the United States are in any way comparable to the contacts the *Rhoditis* vessel had. Because Plaintiffs have not shown that the contacts the Azteca had with the United States were substantial and continuous, the law of the flag factor provides significant weight in favor of the application of Mexican law.[4]

3. The Allegiance or Domicile of the Injured

While there is not an injured individual in this action, Plaintiffs could be considered to be "injured" because their vessel was damaged. Thus, the Court will consider this factor. Plaintiffs claim, without citing authority, that PMM's domicile should not be considered because it chose to bring suit in the United States. The Court is not conducting a venue analysis, so it does not find this argument persuasive. PMM is a Mexican corporation, and its base of operations is in Mexico, which weighs in favor of Mexican law. The

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[4] Plaintiffs assert that discovery is still pending and imply that they may be able to establish that the Azteca was operating under a flag of convenience at a later date. However, this case was filed in July, 2005, and extensive discovery has already been conducted. *See* Defs.' Reply at 7 n.5 (noting that Defendants have already produced over 6,600 documents and deposed a company representative who explained Defendants' operations)

other Plaintiffs are the Underwriters, and the lead underwriter, Navigators Insurance Services of Texas, Inc., is based in Houston, Texas. Since one Plaintiff is domiciled in Mexico and one is in the United States, the Court finds that this factor is neutral.

4. The Allegiance of the Defendant Shipowner

The next factor to be considered is the allegiance of the defendant shipowner. *See Rhoditis*, 398 U.S. at 309–10, 90 S. Ct. at 1734–35. TMM and MarMex are both Mexican companies. Plaintiffs claim that the weight of this factor should be diminished because the Azteca was purchased for $1 from a U.S. company and continues to maintain significant contact with the U.S. following the sale. However, the *ship*'s allegiance is not in question, here. That should be considered under the law of the flag. The Azteca's contacts with the U.S. have little relevance in the determination of its owner's allegiance, which is, unquestionably, Mexico. Thus, this factor weighs in favor of the application of Mexican law.

5. The Place of the Contract

The fifth *Lauritzen-Rhoditis* factor is the place of contract. The facts of the instant case do not involve a contract between the Parties. Thus, this factor bears no weight in the analysis.

6. The Inaccessibility of the Foreign Forum

In *Laurtizen*, the Supreme Court considered whether "justice requires adjudication under American law to save seamen expense and loss of time in returning to a foreign forum." *Lauritzen*, 345 U.S. at

589-90, 73 S. Ct. at 932. Here, the Court must consider whether the application of Mexican law would require adjudication of the dispute in Mexico and cause substantial expense and loss of time to Plaintiffs, who would be required to litigate the case in Mexico. *See Lauritzen*, 345 U.S. at 589–90, 73 S. Ct. at 932 (finding that the injured seaman was not "disadvantaged in obtaining his remedy under Danish law from being in New York instead of Denmark"). Under Defendants' theory that the Mexican Limitation is substantive law and that it requires that all cases relating to the incident be filed in the same court as the limitation, this factor may be relevant. However, as explained below, the Court finds that the London Convention as ratified by Mexico is procedural. Thus, the Court will not apply the London Convention, and Plaintiffs will not be required, even if Mexican law is applied, to litigate this case in Mexico. Therefore, this factor does not weigh in the analysis.

7. The Law of the Forum

The law of the forum factor is "given little weight in determining choice of law." *Fogleman v. ARAMCO*, 920 F.2d 278, 283 (5th Cir. 1991). Since the case was brought in a U.S. District Court, the slight weight given to it lies in favor of the application of U.S. law. *See id.* ("The Foglemans brought their suit in federal district court. Whatever weight the law-of-the-forum factor has, therefore, tells on the side of the application of United States law.").

8. The Shipowner's Base of Operations

The eighth consideration in the *Lauritzen-Rhoditis* analysis is the shipowner's base of operations. TMM and MarMex are based in Mexico. Plaintiffs claim that discovery is ongoing and that they are still trying to determine the "true nature and extent of Defendants' base of operations." Pls.' Resp. at 9. However, this case was filed in July, 2005, and extensive discovery has already been conducted. Plaintiffs have not offered evidence of ties to the United States that could be considered significant enough to deem TMM or MarMex's base of operations to be in the United States. Thus, this factor weighs in favor of the application of Mexican law.

9. Conclusion Regarding Choice of Law

The Court weighs the factors discussed above, keeping in mind the Supreme Court's admonition that the factors should not be applied mechanically. *See Rhoditis*, 398 U.S. at 308–09, 90 S. Ct. at 1733–34. Even so, the only factor weighing in favor of the application of U.S. law is the law of the forum. The fact that Plaintiffs brought this case in a U.S. District Court and that the Court is therefore more familiar with U.S. law than Mexican law[5] is by no means substantial enough of a consideration to outweigh the factors that favor the application of Mexican substantive law. The allision occurred forty-five miles off the coast of Mexico, in the Bay of Campeche. Both

[5] Furthermore, this Court has, on many occasions, applied Mexican law and is sufficiently adept at the application of foreign law to consider this factor almost irrelevant.

vessels bore the Mexican flag. The defendant shipowner is a Mexican corporation, and its base of operations is in Mexico. The *Lauritzen-Rhoditis* factors overwhelmingly favor the application of Mexican substantive law. Thus, the part of Defendants' Motion and Notice to Apply Mexican Law that requests the application of Mexican substantive law is **GRANTED**.

III. "Transfer" of Venue

TMM and MarMex claim that Mexican law applies to this suit and that Mexican law requires any claims relating to the Mexican Limitation to be "transferred" to the court in which the limitation action is pending. Therefore, according to TMM and MarMex, this Court should transfer this case to the 6th Judicial District in Civil Matters of the First Circuit of Mexico, which the Court construes as a motion to dismiss in favor of litigation in Mexico.

Plaintiffs correctly assert that cases cannot be transferred from one nation to another. Rather, if the defendant in an international case believes the case should be in a foreign court, that defendant should file a motion to dismiss for *forum non conveniens*. In the instant case, Defendants already filed a Motion to Dismiss for *Forum non Conveniens*, and this Court already denied said Motion. To do so again is redundant and unnecessary. Therefore, Defendants' Motion to "Tranfer" is **DENIED**.[6]

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[6] Plaintiffs also claim that transfer is not proper because the Mexican statute of limitations to establish liability, which is two years, has run. Defendants argue that it has not run and that, even if it had, Plaintiffs' failure to file a claim in the court in which the Mexican Limitation proceeding was pending is their

IV. Summary Judgment

A. Legal Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. at 2252 53. If the party moving for summary judgment bears the initial burden of proof, "either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). When the party moving for summary judgment does not bear the initial burden of proof, said party must "inform[] the district court of the basis for its motion, and identify[] those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. at 2253. Then, in either case, the non-moving party must come forward with "specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The court must view all evidence in a light most favorable to the non-movant and "draw all reasonable inferences in favor of the non-moving party." *Chaplin v.*

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own fault. During the Second Motion Hearing, Dr. Melo testified that the Mexican Limitation had been renewed every year since it was filed, so Plaintiffs should still be able to file in Mexico should they desire to do so.

NationsCredit Corp., 307 F.3d 368, 372 (5th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S.242,249–50, 106 S. Ct. 2505, 2511 12, 91 L. Ed. 2d 202 (1986). If the evidence would permit a reasonable fact-finder to find in favor of the non-moving party, summary judgment should not be granted. *Liberty Lobby*, 477 U.S. at 247 48, 106 S. Ct. at 2510. On the other hand, "[i]f the evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted." *Id.* at 249–50, 106 S. Ct. at 2511 (citations omitted).

B. Analysis

Defendants claim that the Limitation of Liability Act is substantive law in Mexico and that it requires all claims regarding the incident for which the limitation was established to be brought in the same Mexican court in which the Limitation was originally filed. Thus, TMM and MarMex request that the Court dismiss this case because it must be heard in the 6th Judicial District in Civil Matters of the First Circuit of Mexico. In the alternative, TMM and MarMex request that the Court stay the proceedings pending the outcome of the Mexican Limitation action and require PMM and the Underwriters to make an appearance therein. If the Court is unwilling to do so, TMM and MarMex request that the Court apply the substantive law of Mexico and limit the liability of the Defendants to the amount of the Mexican Limitation fund.

Conversely, Plaintiffs claim that the Mexican limitation is merely a procedural method of establishing a fund in which claimants receive their proportionate share of the funds. Since U.S. Courts that are applying foreign substantive law still follow

U.S. procedural law, Plaintiffs argue that the Court is not required to observe the allegedly procedural Mexican Limitation. The Supreme Court, in *Black Diamond Steamship Corp. v. Robert Stewart & Sons (The Norwalk Victory)*, addressed this issue. It explained that "if . . . the [foreign] limitation attaches to the right," then U.S. courts should observe the limitation. *The Norwalk Victory*, 336 U.S. 386, 395, 69 S. Ct. 622, 627, 93 L. Ed. 754 (1949). However, if the limitation "merely provides procedural machinery by which claim[s] otherwise created are brought into concourse and scaled down to their proportionate share of a limited fund," then the U.S. court need not observe the foreign limitation because the "forum is not governed by foreign rules of procedure." *Id.* at 396, 69 S. Ct. at 627. The Supreme Court warned, however, that "these apparently clear-cut alternatives are [not] exhaustive" in that "a limit which attaches not to an individual's right of recovery but to the aggregate claims arising from a given tort can be said to be 'attached to the right' only in a special sense of the phrase, and a rule which operates to cut down the amount recoverable by a claimant cannot be fitted within any but a very broad definition of the term 'procedure.'" *Id.* Here, if the 1994 Mexican Navigation Act,[7] which incorporates the London Convention, creates a substantive right, then the Court must honor it. If the Act merely provides a way to quantify rights that parties obtain from other sources, then the Court is not required to observe the Mexican Limitation.

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[7] Both Parties agree that the 1994 Navigation Act, not the 2006 Navigation Act, applies in this instance because the allision occurred before the 2006 Act was enacted.

The Parties' experts eloquently offered their starkly conflicting opinions regarding whether the London Convention as adopted by Mexico in 1994 is procedural or substantive during the Second Hearing. Defendants' expert, Dr. Melo, was involved in drafting the 1994 Mexican Navigation Act and was thus instrumental in Mexico's ratification of the London Convention. Dr. Melo testified that the 1994 Navigation Act only adopts the first eight articles of the London Convention, which he claims are substantive, and that the ninth article, which he claims contains the procedural mechanisms for the enforcement of the substantive rights contained in the first eight articles, was not adopted due to time constraints. Thus, according to Dr. Melo, the 1994 Navigation Act contains no procedural mechanisms and is entirely substantive. He claims that the 1994 Act creates a substantive right to limit one's liability.

Plaintiffs' expert, Dr. Enriquez, who was involved in drafting the 2006 Mexican Navigation Act and is responsible for the regulations arising from the 2006 Act, explained that the 1994 Act details the quantum and the procedure for determining the quantum of a limitation fund, and that it incorporates the London Convention. Dr. Enriquez testified that all Mexican substantive rights arise in the Civil Code, and that, even if Mexico had not adopted the London Convention, the right to recover, which is bestowed in the Civil Code, would still be available. According to Dr. Enriquez, the London Convention merely provides the procedural mechanism for limiting the amount available if a party should exercise its right of recovery

under the Mexican Civil Code.[8] Dr. Enriquez, who has an LLM in English maritime law, also testified that English courts consider the London Convention to be procedural, not substantive.

While the Court found the testimony and experience of both experts to be beyond reproach, and the testimony of both to be highly persuasive, Dr. Enriquez's interpretation is more in line with the distinction noted by the Supreme Court in *The Norwalk Victory*. While Dr. Melo's contention that a right to limit one's liability is created by the London Convention seems intuitively correct, the Court is convinced that such a right fits within the Supreme Court's "broad definition of 'procedure.'" The "right" created by the London Convention creates a right to limit the *remedy*, not a substantive right to recover. *See Oceanic Steam Navigation Co. v. Mellor (The Titanic)*, 233 U.S. 718, 733–34, 34 S. Ct. 754, 756, 58 L. Ed. 1171 (holding that a U.S. limitation may be applied to foreign ships that are sued in the United States when they are not subject to U.S. substantive law and differentiating between limiting the remedy and limiting the right). In Mexico, the Mexican Civil Code creates the substantive right to recover, and the quantum of recovery is determined by the Navigation Act/London Convention. Thus, the Court finds that the London Convention, as incorporated in the Mexican Navigation Act, is procedural. Since U.S. courts apply U.S. procedural law, the instant claim

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[8] Dr. Enriquez consulted with three other admiralty professors, who each agreed that liability limitation in Mexico is procedural. *See, i.e.*, Second Motion Hearing, Plaintiffs' Bench Brief in Support of Application of the U.S. Limitation of Liability Act Exs. I–K.

does not have to be heard in the same court in which the Mexican Limitation is pending. Additionally, even though Mexican substantive law applies to the instant case, if Defendants are found liable under Mexican law, their liability will not be limited by the Mexican Limitation now pending in the 6th Judicial District in Civil Matters of the First Circuit of Mexico. TMM and MarMex's Motion for Summary Judgment is **DENIED**.

V. Conclusion

For the reasons articulated above, TMM and MarMex's Motion and Notice to Apply Mexican Law is **GRANTED IN PART AND DENIED IN PART**. Mexican substantive law applies to this case, but Mexican procedural law does not. The Mexican Navigation Act is procedural. TMM and MarMex's Motion to Transfer Venue to the 6th Judicial District in Civil Matters of the First Circuit of Mexico is **DENIED**. TMM and MarMex's Motion for Summary Judgment and all the requests made therein are **DENIED**.

IT IS SO ORDERED.

DONE this 10th day of May, 2007, at Galveston, Texas.

/s/ Samuel B. Kent
Samuel B. Kent
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:05-cv-419
(ADMIRALTY)

[Filed April 29, 2008]

PERFORACIONES MARITIMAS MEXICANAS S.A. de C.V. and CERTAIN REINSURING UNDERWRITERS SUBSCRIBING TO REINSURANCE CONTRACT NO. AHE 030044 AS AMENDED TO NO. AHE-04004,	)
Plaintiffs,	)
v.	)
SEACOR HOLDINGS, INC., GRUPO TMM S.A. de C.V., and MARITIMA MEXICANA S.A. de C.V.,	)
Defendants.	)

MEMORANDUM AND ORDER

Pending before the Court is Defendants' Second Motion for Reconsideration of Order on Defendant's Motion to Dismiss; Or In the Alternative First

Opposed Motion for Reconsideration of Order Denying Defendant's Request for Certification and Motion for Expedited Consideration. Also pending before the Court is Defendant's request, made at an April 25, 2005 hearing, to bifurcate the trial in this case. Defendants' Motion, Docket No. 246, is **DENIED**. Defendant's request to bifurcate is **GRANTED**.

Defendants have not provided new arguments or evidence that justify a second reconsideration of the Predecessor Court's decision not to dismiss this for lack of subject matter jurisdiction or on grounds of forum non conveniens and international comity. Nor will the Court reconsider its decision not to certify this question for interlocutory appeal.

The Court does believe, however, that bifurcation of the bench trial set for May 5, 2008 is convenient, would serve to expedite and economize this case, and is in the interest of justice. *See Lindsey v. Prive Corp.*, 161 F.3d 886 (5th Cir. 1998); FED. R. CIV. P. 42(b)) (the Court may order a separate trial "for convenience, to avoid prejudice, or to expedite and economize."); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2388 ("The major consideration, of course, must be which procedure is more likely to result in a just and expeditious final disposition of the litigation."). The question of bifurcation is "a matter left to the sound discretion of the trial court on the basis of the circumstances of the litigation before it" and a motion to bifurcate "is not subject to any particular time constraint." WRIGHT & MILLER § 2388. Although bifurcation is an exception to the normal rule of trial procedure, this case involves exceptional circumstances that justify dividing the trial into a liability and damages phase. Among other

things, bifurcation will allow the Fifth Circuit to decide with finality any questions regarding the exercise of jurisdiction over Defendants and the Court's interpretation and application of Mexican law in the liability phase before parties and the Court must incur the additional time and cost that will be required to litigate damages.[1]

Defendants' Motion for Reconsideration is therefore **DENIED**, and Defendants' request to bifurcate is **GRANTED**.

IT IS SO ORDERED.

SIGNED this 29th day of April, 2008.

/S/KEITH P. ELLISON
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

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[1] This case requires the Court to interpret and apply Mexican law, and parties dispute issues as basic as the standard of proof that should apply in the case. It appears that some of these questions, including the standard of proof, may have the greatest bearing in the damages phase of the trial. Parties agree that the bulk of this lawsuit will be devoted to damages.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-41021

[Filed February 17, 2010]

PERFORACIONES EXPLORACIÓN Y PRODUCCIÓN, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing to Reinsurance Contract No. AHE-03004 As Amended to No. AHE-04004	)
Plaintiffs-Appellees	)
v.	)
MARÍTIMAS MEXICANAS, S.A. DE C.V., also known as MarMex	)
Defendant-Appellant	)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 05-CV-00419

ON PETITION FOR REHEARING EN BANC

Before BENAVIDES, DENNIS, and ELROD, Circuit Judges.

PER CURIAM:*

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. This denial notwithstanding, we write briefly to address the continued insistence of Appellant Maritimas Mexicanas, S.A. de C.V. ("MarMex") that the district court erred in its determination that it had subject matter jurisdiction over this case and that dismissal was not warranted for forum non conveniens.

First, MarMex contends that the district court should have concluded that federal courts can only exercise subject matter jurisdiction over maritime collisions when there is some clear United States interest in the collision. In support of this proposition, MarMex relies in part on the Supreme Court's decision in *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932). However, in *Canada Malting*, the Supreme Court reviewed its prior decision in *The Belgenland*, 114 U.S. 355 (1885), and explained that,

> The case of *The Belgenland* arose out of a collision on the high seas between foreign vessels of different nationalities; and the objection was raised that the courts of the

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this order should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

> United States were wholly without jurisdiction. Mr. Justice Bradley, speaking for the court, replied that jurisdiction in admiralty did exist over controversies between foreigners arising without the territorial waters of this country, but that the court in such a case would use its discretion in determining whether to exercise it.

285 U.S. at 420. Therefore, when cases concerning maritime collisions only have attenuated links to the United States, the question is not whether subject matter jurisdiction exists, but rather whether courts should abstain from exercising jurisdiction. *See* 2 Thomas J. Schoenbaum, *Admiralty & Mar. Law* § 14-9 (4th ed. 2004) ("In the United States collision jurisdiction potentially extends to the four corners of the globe, to the high seas and even foreign territorial waters. . . . Blatant forum shopping, however, is a cause for concern, and the courts have adopted several ways of abstaining from exercising jurisdiction . . . where justice requires." (footnotes omitted)).

Second, MarMex continues to assert that this case has no links to the United States and that consequently the district court abused its discretion in failing to grant a forum non conveniens dismissal. Although we addressed this argument in our per curiam panel opinion, we write briefly to highlight in greater detail this case's connections to the United States forum. MarMex acquired the ISLA AZTECA only shortly before the allision that produced this litigation. Four months before the allision, a U.S. corporation affiliated with MarMex transferred the vessel to MarMex under a synthetic lease, and MarMex changed the registration of the ISLA AZTECA from an American to a Mexican flag. Since

the allision occurred so shortly after the transfer of the ISLA AZTECA to MarMex, the vessel's crew had several ties to the United States. A U.S. citizen trained the captain of the ISLA AZTECA and was on board the ship only six weeks before the allision. Additionally, when the allision occurred, the ISLA AZTECA's chief mate was employed by a U.S. corporation and has since been assigned to work in Texas. After the allision, third parties operating out of the United States inspected the ISLA AZTECA and repaired the TOTONACA, and consequently many relevant invoices and records are in English. Indeed, before the trial for this case was bifurcated between liability and damages, MarMex's two designated witnesses concerning damages were residents of Texas. Furthermore, in the years since the allision occurred, the ISLA AZTECA has called on U.S. ports for repairs. Finally, MarMex itself has several links to the United States as well. In 2001, MarMex filed an admiralty lawsuit in the United States District Court for the Southern District of Texas, its general manager is a U.S. citizen, and its website currently states that it has "administrative and operational centers" in Texas and Louisiana.[1]

[1] We note that a court cannot conduct an adequate forum non conveniens analysis simply by listing a case's links to the United States and its links to a foreign forum. *See Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1551 (5th Cir. 1991). Instead, a court must engage in a balancing of private and public interest factors, as performed by the district court and reviewed in our original per curiam opinion. The discussion above does not replace the analysis in our original opinion, but merely supplements our description of the facts underlying it.

As we stated in the original per curiam opinion, we reviewed the district court's forum non conveniens decision for abuse of discretion and cannot substitute our own views for the decision of the district court. MarMex has not shouldered its burden to persuade us that the district court abused its discretion.

For the reasons stated above and in our initial per curiam opinion, MarMex's Petition is DENIED.

APPENDIX J

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

No. G-05-CV-419

[Filed July 26, 2006]

PERFORACIONES EXPLORACIO 'n y PRODUCCIO 'n, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing to Reinsurance Contract No AHE 030044 As Amended to No AHE 04004	)
-vs-	)
SEACOR HOLDINGS, INC., et al; GRUPO TMM SA; MARITAMAS MEXICANAS SA de CV	)

GALVESTON, TEXAS
July 14, 2006
10:00 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE SAMUEL B. KENT

APPEARANCES:

FOR PLAINTIFFS :
JULIA M. ADAM, CARRIE WEITINGER and
DONNA R. CAPPS
Westmoreland, Hall
2800 Post Oak Boulevard
64th Floor
Houston, Texas 77056
713-871-9000
713-871-8962 (fax)

FOR DEFENDANT SEACOR :
JAMES T. BROWN
Legge, Farrow, Kimmitt, Mcgrath & Brown
6363 Woodway Drive
Suite 400
Houston, Texas 77057
713-917-0888
713-953-9470 (fax)

* * *

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THE COURT: Good morning, everyone. Be seated please.

All right. This is a motion proceeding in G-05-419, Perforaciones Exploracio 'n y Produccio 'n y Produccio 'n also known as Protexa versus Seacor Holdings and all them other fellows.

Who's here for the plaintiffs?

MS. ADAMS : Julie Adams.

THE COURT: Well, hello there.

And for the defendants?

MR. STRICKLAND: Your Honor, Tim Strickland, Adrienne Balfour on behalf of Grupo TMM and MarMex.

THE COURT: How are you doing?

MR. STRICKLAND: Good, sir.

MR. BROWN: Jim Brown for Seacor Holdings, Inc., Your Honor.

THE COURT: Hi.

MS. ADAMS: Judge, I also have Carrie Weitinger and Donna Capps with me.

MS. WEITINGER: Hi, Judge. How are you?

THE COURT: How are you doing?

MS. WEITINGER: Fine, thanks.

THE COURT: It sure is nice to see you. How have you been?

MS. WEITINGER: Great.

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THE COURT: How is your daddy doing?

MS. WEITINGER: He's doing good.

THE COURT: Tell him I said hi, will you?

MS. WEITINGER: I certainly will.

THE COURT: All right. Thanks.

All right. So as I understand it, you want to amend --

MS. ADAMS: Yes, sir.

THE COURT: -- to cure some procedural problems and simplify our treatment of some pending motions.

MS. ADAMS: Yes.

THE COURT: And you are the picture of outrage.

Tell me your concerns.

MR. STRICKLAND: Your Honor, this is on the plaintiff's motion for leave. PMM, who's going to be the substituted plaintiff in here, has always been the real party of interest and actually was the Mexican entity that filed the Mexican Querella, the criminal action in Mexico. Before this suit was filed, the Querella was dismissed. And it was absolutely no surprise to the plaintiffs in this case who the actual owner of that rig was. They knew about it back in litigation agreement back in -- a few months after the incident, which was March of 2004.

Discovery responses in December 2005 listed PMM as the rig owner and now almost ten months after this suit was

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filed they want to be added as a plaintiff. They also want to change the defendant from Seacor Holdings -- and I'll let Mr. Brown express that -- but, frankly, Judge, they've known about that for months also. And Seacor Mexico Marine, Inc. is the actual shareholder that owns a part of MarMex and they've known about that for quite a while also.

The critical issue there, Judge, is -- and I'll let Mr. Brown address that -- but Seacor Marine Mexico Inc. is a Louisiana corporation and has no ties with Texas. And that's our proposition to the motion for leave to amend.

THE COURT: Well, you know all that venue and jurisdictional stuff has been muddied by last summer's hurricane season, which blew Louisiana to Texas.

All right. You got anything to add?

MR. BROWN: No, Your Honor.

THE COURT: What he said.

MR. BROWN: What he said.

THE COURT: And your response.

MS. ADAMS: Your Honor, PMM is, indeed, the correct party of interest and, as Your Honor is -- you more eloquently pronounced the name of the original plaintiff than I was ever able to. We named the --

THE COURT: I took a running start.

MS. ADAMS: We named the wrong party. The PMM has been identified all the way through. PMM sent out the initial

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demand immediately after the collision occurred. This is a subrogated case. It's primarily Underwriter's interest. PMM's interest is only to the extent that they paid a deductible in this. There's been no facts that have changed. There's no real parties of interest that are changing. There was nothing nefarious about screwing up and stating the wrong party. It's not like we even hidden them in any way, shape or form.

As to Seacor Mexico we are seeking to add them, not to substitute them. Seacor Holding's story has been, "We have a wholly owned subsidiary" and they hold the 40 percent joint venture share. They can't really produce any documents supporting that and all of their press releases say otherwise, but if they think that their subsidiary is a correct party, then I want both of them in so whichever one shakes out, we have the correct party before the Court.

THE COURT: You leapt to your feet. Was that to say what she said?

MS. WEITINGER: I'm the one who typed the wrong Spanish Mexican name.

THE COURT: Marshal.

THE MARSHAL: Yes, sir.

MS. WEITINGER: I mean, it was not intentional to mislead. So I'm here to -- as my clerical goof up.

THE COURT: Rarely have I heard such an eloquent

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apology. We have a criminal sentencing later. You might want to stick around.

MS. WEITINGER: Whatever you say, Judge.

THE COURT: He could help you hone your skills.

Look, we're set for trial in September. Have you-all been taking many and happy trips to Cancun to do discovery or what's going on?

MS. ADAMS: We came back just last night. We took the depositions of all four of the officers yesterday and the day before.

THE COURT: Corporate officers?

MS. ADAMS: No, officers onboard the ISLA AZTECA.

THE COURT: Oh, all right.

How are you harmed by these changes with two months left before trial?

MR. STRICKLAND: Well, we've got a motion to dismiss that's pending.

THE COURT: They're going to be resolved momentarily, sir.

MR. STRICKLAND: And with regards to PEP, the current plaintiff, and PMM, we have a Robins dry dock defense against PEP, which changes the landscape significantly. If this case stays here, Judge, then that changes the way we approach the entire thing.

THE COURT: Requiring what discovery or mechanical

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presentation problems?

MR. STRICKLAND: We have not begun discovery with regards to damages at all because of the pending motions to dismiss.

MS. ADAMS: Your Honor, I provided them with a complete copy of the adjuster's file shortly after this case was filed. They've had a box of all the documents with everything. This is simple repairs. The adjuster's located here in the Houston area and there should be no problem.

THE COURT: One of the fallacies -- it's almost like an urban myth with which I have empathetically dealt during the entire 16-and-a-half years I've been on the bench -- is this concept in the minds of many lawyers -- many good lawyers that once a dispositive motion is filed, the file freezes. It, in fact, does not. All the deadlines continue to run and it is incumbent upon respective counsel and their parties to prepare the case for final adjudication in anticipation of an negative

ruling on dispositive relief. I'm not going to grant any extensions on that basis.

I'm going to grant the motion to amend. And prepare your deposition schedules accordingly.

Anything else we need to address for the benefit of the plaintiff today?

MS. ADAMS: No, Your Honor. Thank you.

THE COURT: Or for either defendant?

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MR. STRICKLAND: We have the motions to dismiss, Judge, and that was --

THE COURT: They will be ruled upon, I believe, within the next three or four days.

All right. Thank you very much. Good to see each of you.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: I appreciate your help.

MS. WEITINGER: Judge, may I be excused and not wait for the criminal --

THE COURT: No, you must stay the rest of the day. Yes, of course. It's very good to see each of you.

MS. WEITINGER: Good to see you. Thank you, Judge.

(Court recessed at 10:08 a.m.)

I certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

/s/ Jeanette Byers
JEANETTE BYERS, RPR
July 26, 2006

APPENDIX K

DOCKET ENTRIES

U.S. District Court
SOUTHERN DISTRICT OF TEXAS (Galveston)
CIVIL DOCKET FOR CASE #: 3:05-cv-00419

Perforaciones Exploracio'n y Produccio 'n et al.
v.
Seacor Holdings Inc. et al.

Date	#	Description
		* * *
10/26/2007 (p.1235)	179	NOTICE of Reassignment. Pursuant to General Order No. 2007-10, this case is reassigned to the docket of United States District Judge Keith P Ellison. Deadlines in scheduling orders remain in effect. All court settings are vacated. Judge Samuel B Kent no longer assigned to the case. Parties notified, filed. (jegonzalez,) (Entered: 10/26/2007)
		* * *

APPENDIX L

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL NO. 3:05-419

[Dated May 6, 2008]

PERFORACIONES EXPLORACION Y PRODUCCION, ET AL	)
	)
Versus	)
	)
SEACOR HOLDINGS, INC. and GRUPO TMM SA, ET AL	)
	)

Houston, Texas
9:00 a.m.
May 6, 2008

* * * * *

BENCH TRIAL

BEFORE THE HONORABLE KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

Volume 2 of 2

* * * * *

Proceedings recorded by computer stenography
Produced by computer-aided transcription

Edward L. Reed, CSR
United States Court Reporter
515 Rusk, Suite 8016
Houston, Texas 77002 * 713-250-5594

* * *

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Michael Kneeland - Direct by Ms. Gabbert

A. In 31 March 2004?

Q. Yes, sir.

A. Well, this was a boat that we operated, this was a boat that MarMex owned, a boat that MarMex crewed. We're responsible for all aspects of it. It was a contract we had between MarMex and Pemex. We are responsible for every aspect of this boat, from crewing to groceries, to maintenance to dry docking. So this was one of our vessels.

Q. And did that also include training of the crew members?

A. Yes, it did.

Q. And you said that at the time of the allision, was the ISLA AZTECA under charter with Pemex?

A. It was.

Q. And in the agreement with Pemex, was there a choice of law provision?

A. A choice of law provisions. I believe all the Pemex contracts stimulate Mexico.

MS. FENDLER: Again, I'm objecting to the relevance of this. This all goes to the "*forum non*" issues that have been previously addressed.

THE COURT: I'm going to allow it.

BY MS. GABBERT:

Q. Was there anything from an operational standpoint

* * *